



THE INDIAN LAW REPORTS, CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT AND FROM ALL
OTHER COURTS IN BRITISH INDIA (EXCEPT THE
COURT OF THE JUDICIAL COMMISSIONER
OF OUDH) NOT SUBJECT TO ANY
HIGH COURT.

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THE HIGH COURT.

1910.

—o—

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ERRATA.

- Page 40, line 15, for "*Kalkiishore*" read "*Kalikishore*".
- Page 130, last line, (ref.) for "Calc. 25" read "25 Calc."
- Page 294, line 3 from bottom, (ref.) for "2 Ch. D." read "28 Ch. D."
- Page 369, line 3 from bottom, (ref.) for "De G. & M. & C." read "De G. M. & G."
- Page 387, head-note (italics) 2nd line, for "VI of 1881" read "V of 1881."
- Page 643, last line but one, for "Mookerjee and Teunon JJ." read "Mookerjee and Carnduff JJ."
- Page 663, last line but one, (ref.) for "34 Calc. 602" read "34 Calc. 902".
- Page 871, line 15, for "instituted" read "intituled".

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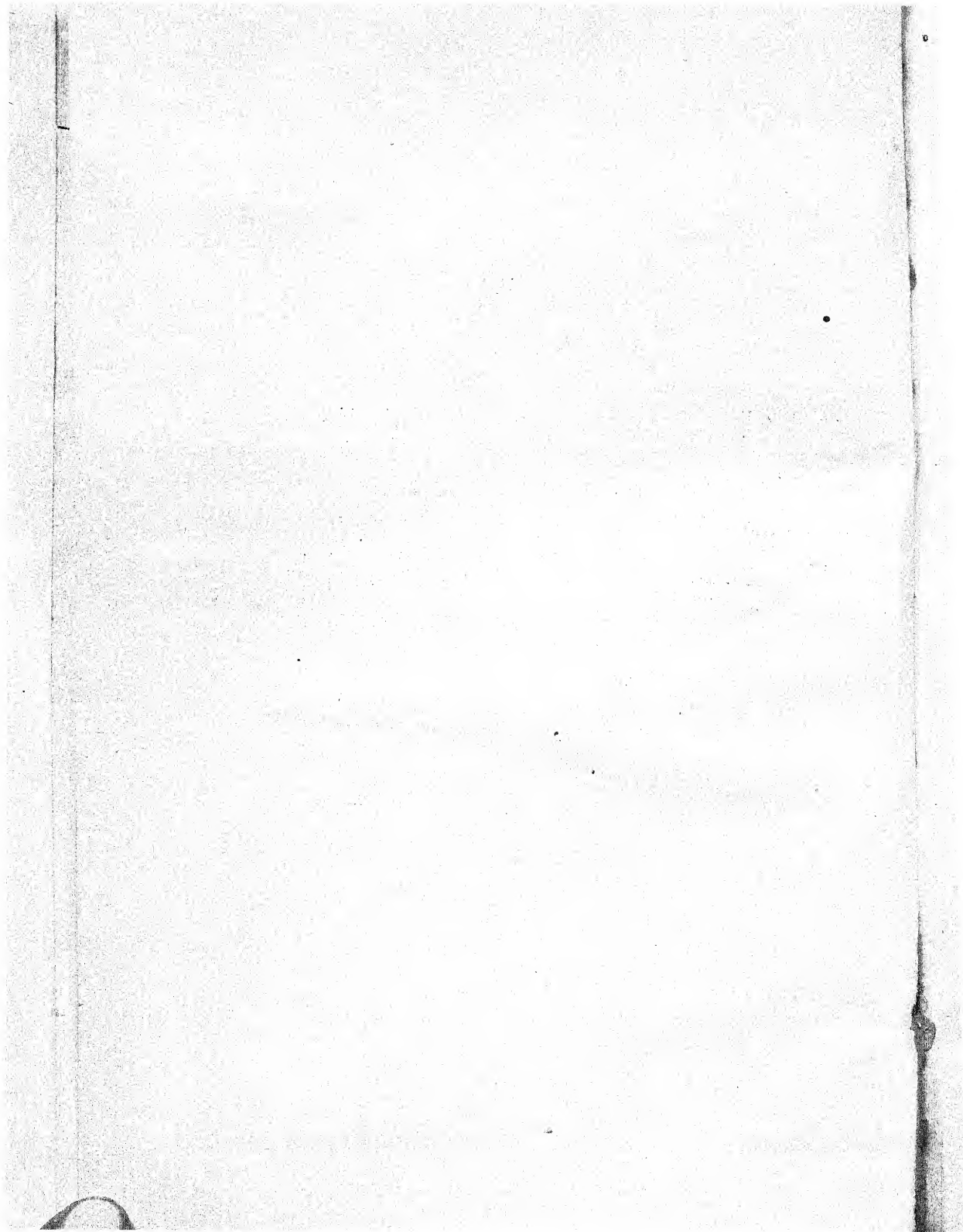


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—◆—
APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

CHURAMAN SAHU

v.

GOPI SAHU.*

1909

April 14

Hindu law—Mitakshara—Gift by Hindu widow to daughter—Gift of immoveable property to daughter at “gowna” or “dwiragaman” ceremony—Post-nuptial gifts—Reversionary heirs.

It is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's gowna ceremony; and such a gift is binding upon the reversionary heirs of her husband.

SECOND APPEAL by the defendants, Churaman Sahu and others.

Musammat Janki Koer, the widow of Amrita Lal, a Hindu governed by Mitakshara law, made a gift of a house to her daughter Musammat Gango Koer, by a deed of gift dated the 28th December, 1891, on the occasion of the daughter's “gowna” ceremony. Musammat Gango Koer died childless in October, 1894, and Ajodhya Pershad, the *pro formâ* defendant, as her heir, sold the house to one Muni Lal, the defendant No. 2, and his son Churaman Sahu, the defendant No. 1.

The plaintiff on the death of Musammat Janki Koer as reversionary heir, commenced this action for a declaration of

* Appeal from Appellate Decree, No. 1063 of 1907, against the decree of L. Palit, District Judge of Gaya, dated May 20, 1907, reversing the decree of Nistaran Banerjee, Subordinate Judge of Gaya, dated Sept. 3, 1906.

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title and recovery of possession with mesne profits. The defendants Nos. 1 and 2 contested the suit on the ground that the gift to Musammat Gango Koer having been made for a lawful purpose the sale to them by her conferred on them an indefeasible title.

The Subordinate Judge held that the "*gowna*" ceremony was practically the completion and consummation of the marriage ceremony and that a gift of the immoveable property to the daughter by the mother on such an occasion must be treated as made for a valid and religious purpose, and that the gift was reasonable in extent, and he accordingly dismissed the plaintiff's suit. The lower Appellate Court, however, reversed the judgment of the Subordinate Judge and decreed the suit with costs. The defendants appealed to the High Court.

Dr. Rashbehary Ghose (Babu Golap Chandra Sircar, Babu Jogendra Chandra Guha and Babu Lakshmi Narain Singh with him), for the appellants.

Babu Umakali Mookerjee (Babu Kulwant Sahay with him), for the respondents.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. The subject-matter of the litigation, which has resulted in this appeal, is a house which admittedly belonged to one Amrita Lal, a Hindu governed by the Mitakshara law. He died on the 1st October, 1886, and left a widow, Musammat Janki Koer, and an unmarried daughter, Musammat Gango. The daughter was given in marriage to the third defendant, Ajodhya Pershad, in May, 1889. Her *gowna* ceremony took place more than two years after her marriage, and on the 28th December, 1891, within a few days of the performance of that ceremony, her mother executed in her favour an absolute deed of gift in respect of the disputed house. Musammat Gango continued to be in possession of the house as her *stridhan* property, and died in October, 1894. On the 5th January, 1899, her husband, as her legal heir, transferred the house to the first two defendants. Musammat

Janki Koer, the widow of the original owner, died on the 24th March, 1905, and on the 23rd July, 1905, the first plaintiff, who is distantly related to the original owner and is his nearest reversionary heir, executed a conveyance in favour of the 2nd plaintiff, under which he purported to transfer a half share in the house upon the allegation that the deed of gift of the 28th December, 1891, was inoperative after the death of the executant. On the 19th August, 1905, the plaintiffs commenced this action for declaration of title and recovery of possession, as also for mesne profits. The first two defendants, who had purchased from the husband of the daughter of Amrita Lal, resisted the claim substantially on the ground that the gift had been made for a lawful purpose, and had consequently created an indefeasible title in the donee. In the Court of first instance, the Subordinate Judge held that the *gowna* ceremony was practically the completion and consummation of the marriage, and that a gift of immoveable property to the daughter by her mother on that occasion must be treated as made for a valid religious purpose. He further found that the gift was reasonable in extent, and in this view he concluded that a distant reversionary heir like the plaintiff had no good ground for complaint. Upon appeal, the learned District Judge held that the *gowna* ceremony could not, except on philosophical and sentimental grounds, be regarded as part of the marriage ceremony, that there was no authority which entitled a Hindu widow to make a gift out of the estate of her husband to a daughter on the occasion of her marriage, and that much less could she do so on the occasion of the *gowna* ceremony. In this view, the District Judge reversed the decision of the Court of first instance and decreed the suit with costs. The defendants have now appealed to this Court and the substantial question of law, which has been argued on their behalf, is, whether a Hindu widow, governed by the Mitakshara law, is competent to make an absolute gift in favour of her daughter, on the occasion of the latter's *gowna* ceremony, of a reasonable portion of the immoveable property left by her husband. We have been invited on behalf of the appellants to answer this question in the

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affirmative, while it has been strenuously contended on behalf of the respondents that, although, under the Hindu law, it may be open to a widow to make a suitable gift to her daughter on the occasion of her marriage, neither principle nor authority can be invoked in support of the validity of a post-nuptial gift to a daughter. The question raised is one of great importance and of some nicety; but upon a careful examination of the principles and authorities, which we shall presently explain, we feel no doubt that the question ought to be answered in support of the validity of such a gift.

That gifts to a bride on the occasion of her marriage, as also at the time of the bridal procession, are of considerable antiquity cannot be denied. There are passages in the Rig Veda, which describe such gifts: for instance, in Mandal 10, Sukta 85, verses 9 and 11, it is mentioned that Surjya gave his sister in marriage, who was asking in her mind for a husband, and that, when she was carried to her husband's home, the presents which had been given to her were carried before the cart. And to come down to considerably more modern times, we find gifts to brides on the occasion of marriage recognised as one of the commonest forms of *stridhan* or woman's peculiar property. Thus in a passage from Manu (IX, 194) and Katyayana quoted by Jimutavahana in the Dayabhaga, Chapter IV, section 1, para. 4, what is given before the nuptial fire and what is presented in the bridal procession, are described as two out of the six-fold forms of *stridhan*. To the same effect is a passage from Narada (XIII, 8) where mention is expressly made of gifts before the nuptial fire or presented in the bridal procession. Vishnu and Yajnavalkya apparently do not expressly mention gifts at the time of the bridal procession, but they refer to what is received and what is given before the nuptial fire. Again, whatever a woman receives at the time she is taken from her father's house to her father-in-law's house, is denominated as her *stridhan* under the terms *Adhya Vahanika*, which means presented in the bridal procession. When we turn to the Mitakshara, Chapter II, section XI, paras. 4 and 5, we find the commentator adopting the definitions given by Manu and Katyayana

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and recognizing what is presented to the bride before the nuptial fire or in the bridal procession as an ordinary form of *stridhan*. To the same effect is the discussion in the *Viramitrodaya*, Chapter V, part I, section III (Sastri Golap Chandra Sarkar's Translation, p. 222). There can be no question, therefore, that from the earliest times institutional writers and commentators on Hindu law have recognised gifts to a bride at the time of her marriage before the nuptial fire, as also what is received by her, when she is conducted from her father's house to her husband's, as among the most common forms of a woman's property. It would be a mistake to suppose, however, that the right of a Hindu daughter whose father is dead, to receive a dowry at the time of her marriage from the estate of her father is dependent merely upon ancient custom. There are express texts which show that, if a man leaves unmarried daughters, the persons, who take his property by inheritance or by survivorship, are bound to make adequate provision for their marriage. Thus in *Manu*, Book IX, verse 118, it is provided that, "to the unmarried daughters by the same mother, let their brothers give portions out of their own allotments respectively according to the class of their several mothers; let each give a one-fourth part of his own distinct share; and those who refuse to give it shall be degraded." To the same effect is the rule laid down in *Yajnavalkya*, Book II, verse 124, that "uninitiated sisters should have their ceremonies performed by those brothers, who have already been initiated, giving them a quarter of their own share." With reference to this last text, it appears that, although at one time *upanayana* as distinct from marriage was allowed to females, now, according to usage and a well-known text of *Manu* (Book II, verse 67), their initiation consists of their marriage. The two texts, to which we have just referred, have led to considerable difference of opinion amongst commentators; one school adopts a liberal construction, while another school maintains that all that is intended to be laid down is, as stated in the text of *Vishnu*, "that the marriage ceremony of the unmarried daughters should be performed according to the father's wealth," and that the word "quarter" is here used, not in its

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plain sense, but simply to enjoin the allowance of as much as will suffice for the marriage of the sisters. Visvanath Mandalik in his edition of the Institutes of Yajnavalkya, at page 217, points out that Vachaspati Misra follows this interpretation, and his view is adopted by Sulapani. The Smriti Chandrika, Bharuchi, a commentator of Manu, and Jimutavahana follow the same rule, whereas Vijnaneswara and the author of Viramitrodaya notice this interpretation and reject it; the authors of the Mayukha and the Kamalakara follow Vijnaneswara, while Apararka and Medhatithi in their commentaries on the text of Manu, which we have just quoted, also make observations to the same effect. It may further be mentioned that Apararka, in his commentary on the Institutes of Yajnavalkya (Poona edition, Vol. II, page 731) relies upon the text of Narada and Vyasa in support of the view that an unmarried daughter is entitled to a quarter of the share, which she would have received, if she had been a son. But whichever view be accepted, it is clear from the Mitakshara, Chapter I, section 7, paragraphs 5 to 14, and from Viramitrodaya, Chapter II, part I, section 21 (Sastri Golap Chandra Sarkar's Translation, pages 81 to 84), that the maiden daughter is entitled to a share, which represents her dowry and marriage expenses, and such share is one-fourth of what she would have been entitled to receive, if instead of being a daughter she had been a son. These texts are, in our opinion, sufficient to support the view that when upon the death of a Hindu governed by the Mitakshara law, his property is taken by his widow, a gift by the widow to her daughter on the occasion of her marriage out of the estate of her husband is within her powers, provided that the portion so given is reasonable in amount, and that the question whether it is reasonable or not has to be determined with regard to what would have been the share of the unmarried daughter under the rules laid down in the Mitakshara, Chapter I, section 7, paragraphs 5 to 14. That a Hindu widow is entitled to alienate a portion of her husband's estate for the marriage of her daughter is beyond controversy. As to this, it will suffice to refer to the Vyavastha Darpan of Shama

Charan Sircar (1st edition, page 59; 2nd edition, page 54), where it is stated that the widow is competent, even without the consent of reversioners, to make a sale or other disposition of her husband's property for the marriage of her daughter, and in support of the assertion, reliance is placed upon the text of Devala to the effect that "to maidens should be given a nuptial portion of the father's estate" (Jagannath's Digest translated by Colebrooke, Vol. I, page 135), and upon other texts of Vasistha and Paithinashi, which indicate plainly the religious benefit accruing to the father of a girl upon her marriage, and the sin committed, if the maiden is not given away in marriage before she attains puberty (Jagannath's Digest translated by Colebrooke, Vol. III, page 460). The same view has been adopted in judicial decisions of the highest authority. Thus in the case of *Cossi Nath Bysack v. Hurro Soondery* (1), which was heard by the Supreme Court at Calcutta in 1819 and by the Judicial Committee in 1826 [2 Morley's Digest, 198; Clarke's Rules and Orders 1834, page 91; Montrieu's Cases on Hindu Law, 477 to 507; Vyavastha Darpan, 2nd edition, pages 89 to 107], it was stated by Lord Gifford, in delivering the opinion of their Lordships, that a Hindu widow had, "for certain purposes a clear authority to dispose of her husband's property, and might do it for religious purposes, including dowry to a daughter." The learned Judge further added that it was in his opinion absolutely impossible to define "the extent and limit of her power of disposing it, because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition." The validity of gifts on the occasion of marriage of unmarried daughters has also been affirmed in more recent cases. Thus in the case of *Ramasami Ayyar v. Vengidusami Ayyar* (2), it was ruled that, when upon the death without issue of a Hindu, in whom the whole of the family property had vested, her mother took the estate and subsequently gave a portion of the property to her son-in-law on the occasion of his marriage with

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(1) (1826) Clarke's Rules and
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(2) (1898) I. L. R. 22 Mad. 113.

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her daughter, the gift, which was found not to be otherwise than reasonable in extent, was upheld as binding on the reversioner. Mr. Justice Subramania Ayyar relied upon passages from the Mitakshara, Chapter I, section 7, paragraphs 6 to 14, and Smriti Chandrika, Chapter IV, section 20, which deal with the question of allotment to be made by brothers to their maiden sisters at the time of partition, and referred to the circumstance that the commentators were divided as to their precise import, some of them holding that all that the texts mean is that the funds required for the marriage of sisters should be provided out of their father's estate, and others maintaining that, inclusive of their marriage expenses, sisters are entitled to a provision not exceeding one-fourth of what they would have obtained had they been males. The learned Judge, without deciding the question which of the two views has to be taken as law, held that the texts justified something more than a disbursement out of the estate of only the price of things required in connection with the celebration of the marriage, and that the better and sounder view was that the authorities should be understood to empower a qualified owner, like a widow, to do all acts proper and incidental to the marriage of a female, according to the general practice of the community to which she belongs. In the particular case then before the Court, it was held that as at the time when a girl belonging to the community concerned was handed over in marriage, certain gifts had to be made to the bridegroom, one of which was *bhoodanam* or gift of land, a gift by the widow in conformity with immemorial custom must be upheld. The learned Judge also observed that the gift could be defended on the ground that, apart from the circumstance that it was a provision for the married couple, it was believed to enhance the merit of the primary act, namely, the giving of a virgin in marriage, which from a religious point of view is supposed to be productive of considerable benefits to the parents. We are entirely in agreement with this view of the law, which is, moreover, supported by still later decisions. Thus in *Kudutamma v. Narasimhacharyalu* (1), it has been

(1) (1907) 17 M. L. J. 528.

ruled that a Hindu father governed by the Mitakshara law, who would not ordinarily be entitled to transfer any portion of the coparcenary property, is entitled to make a gift by way of marriage portion to his daughters out of the family property to a reasonable extent, and, further, that a Hindu brother, the managing member of a joint family, does not act in excess of his powers as such when he gives away a reasonable portion of the joint family property to his sisters who, though married in their father's lifetime, were left for some reason or other without marriage portions. The learned Judges held that they were not required to rule that the brother was bound to do so or that the father was bound in law to give his daughter anything at her marriage, but that all that was necessary to rule was that the gift was not in excess of the powers of the brother, and could not, therefore, be recalled by him or avoided by his son. The case of *Kamakshi Ammal v. Chakrapany Chettiar* (1) is not really opposed to this view, and is at best an authority for the proposition that an undivided member of a Hindu family governed by the Mitakshara law has no power to alienate a considerable portion of the joint family property by way of gifts to the female members of the family, specially when the gift is not shown to have been made in connection with the marriage of such female members. Substantially the same view was taken by the Allahabad High Court in *Rustam Singh v. Moti Singh* (2), in which it was ruled that, when a Hindu leaves an unmarried daughter, her mother, in order to raise money to meet the expenses of the daughter's marriage, may mortgage properties of her own which had come to her from her father, and that such an alienation was binding upon the reversionary heirs of her father. The decision of this Court in *Damoodur Misser v. Senabuttu Misrani* (3), in which it was stated that properties sufficient to defray the expenses of the nuptials should be given to unmarried daughters, tends in the same direction. Upon the authority of the ancient texts and of the commentators, as also upon the judicial decisions to

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(1) (1907) I. L. R. 30 Mad. 452.

(2) (1896) I. L. R. 18 All. 474.

(3) (1882) I. L. R. 8 Calc. 537.

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which we have referred, there cannot, in our opinion, be any reasonable doubt that a gift by a Hindu widow of a reasonable portion of her husband's immoveable property to her daughter in connection with her marriage is within the scope of her authority as a qualified owner and is binding upon the reversionary heirs of her husband. It was strenuously contended, however, by the learned vakil for the respondents that the *gowna* ceremony would not, for the purpose of this rule, be treated as part of the marriage or necessarily connected with it. In our opinion, this contention is entirely unfounded. What is called the *gowna* ceremony is also known as the *dwiragaman* ceremony; that is, the ceremony performed when the young wife, upon the attainment of puberty, leaves her parental home to take up her residence in the house of her husband. The authorities, to which we shall presently refer, provide for the performance of ceremonies on the occasion, and it is well known that it is customary to make gifts to a daughter of the house at the time she leaves her parental abode. It is not, of course, suggested that the marriage ceremony is incomplete without the *dwiragaman* ceremony. The relationship of husband and wife is indissolubly created by the performance of the marriage ceremony. So far as that relationship is concerned, it is finally and conclusively established upon the completion of the ceremonies performed at the time of the marriage. Nevertheless, the *dwiragaman* ceremony is regarded as an essential complement to marriage, and it is an occasion of importance, on which, according to the customs prevalent in Behar, gifts have to be made to the daughter. Raghunandan in his *Jyotish-tawta* (Institutes, Vol. I, page 360) quotes a verse from Narayan Paddhati, which defines *dwiragaman* as the second entrance of the bride into the house of her husband from that of her father after the celebration of the marriage. Such is the importance attributed to this ceremony, that Sanskrit works on law and ritual abound in minute rules as to the time when alone it can be performed. Thus Raghunandan in the work just mentioned quotes a verse from *Kritya Chintamani* to the effect that a bride, if her *dwiragaman* is celebrated in the eighth year, kills

her mother-in-law ; if in the tenth year, kills her father-in-law ; and if in the twelfth year, kills her husband. Raghunandan again relies upon a verse of Prachetas quoted in the Sripati-Sanhita, which prescribes that the *dwiragaman* ceremony can be performed only under certain constellations on defined auspicious moments. To the same effect are passages in the Dipika, Sat Kritya Muktabali, Jyotish Sara-Sangraha and Muhurta Chintamani (Benares edition, Sambat 1930, page 84). Similar restrictions are also prescribed by Gadadhar Dikhit, who flourished in Behar, in his commentary on the Parasara Girhyasutra of the Yajur Veda, Kanda I, Aphorism 2 (Benares edition, page 145). No reference to the *dwiragaman* ceremony is apparently to be found in the Vedas (Marriage Hymn in Mandal X, Sukta 85, Wilson's Rig Veda, Vol. VI, page 223) for the obvious reason that in Vedic times marriages of girls took place after attainment of puberty and the bride finally left the parental abode immediately upon the completion of the marriage ceremony. In later times, however, when the custom of marriage before puberty became firmly established, simultaneously the custom of *dwiragaman* grew up and came to be recognised in authoritative Sanskrit works on Hindu ritual. The works, to which we have referred, are fairly old ; for instance, the writings of Raghunandan go back to the fifteenth century, the Muhurta Chintamani dates back to the sixteenth century, and the Jyotish Sara-Sangraha was composed at about the same period. But there are other works of a much earlier date which speak of the *dwiragaman* as an important ceremony in relation to marriage ; for instance, in the Sanskara Ratnamala of Gopinath, one entire section is devoted to marriages (Poona edition, Vol. I, pages 454-603), and on page 570 the learned author describes *dwiragaman* as related to marriage and closely connected with it, on the authority of a text of Vyasa. The authenticity of the text of Vyasa can hardly be called in question, as the same text is quoted in Nirbandha Siromani and Nirnaya Sindhu (Bombay edition, 1901, page 243). These references amply show that the *dwiragaman* ceremony is treated in works of authority as a ceremony of importance closely

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connected with marriage. In our opinion, there is no substantial distinction between gifts made at the nuptial fire or in the bridal procession and gifts made at the time of the *dwiragaman* ceremony. In fact, gifts made at the time of the *dwiragaman* ceremony, may rightly be regarded as dowry deferred, and if it was competent to Janki Koer to make a gift to her daughter, Musammatt Gango, on the occasion of her marriage, it was equally competent to her to make a gift on the occasion of her *gowna* ceremony. The only question is whether the gift was of a reasonable portion of her husband's immoveable property. On the principle laid down by Lord Gifford, to which we have already referred, this must be determined with regard to the circumstances of the particular disposition. Now the evidence shows that Amrita Lal died, leaving only one daughter; and his properties consisted of three houses, the total value of which according to the evidence given on behalf of the defendant, which is more detailed and more trustworthy than that adduced on behalf of the plaintiff, was approximately Rs. 3,800. The particular house, which was transferred by way of gift to the daughter, was worth about Rs. 1,200; in other words, the value was a little more than one-fourth and a little less than one-third of the total value of the three houses. In these circumstances, it is impossible to say that the gift was unreasonable in extent.

On all these grounds, we must uphold the contention of the appellants, that it is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's *gowna* ceremony, and that such gift is binding upon the reversionary heirs of her husband. We further hold that in the circumstances of the case before us, the gift was proper and reasonable and conferred an absolute title upon the donee.

The result, therefore, is that this appeal must be allowed, the decree of the District Judge set aside, and the decree of the Subordinate Judge restored. We direct that each party do pay his own costs throughout the litigation.

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Appeal allowed.

CIVIL RULE.

Before Mr. Justice Chitty and Mr. Justice Carnduff.

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Sanction for prosecution—Jurisdiction—High Court, jurisdiction of—District Judge—Criminal Procedure Code (Act V of 1898) ss. 195 (1) cl. (b), and 476—Revision—Civil Procedure Code (Act V of 1908) s. 115.

Neither the High Court nor the District Judge has power, under section 476 of the Criminal Procedure Code, to direct a prosecution for an offence committed before a Provincial Small Cause Court.

Begu Singh v. Emperor (1) referred to.

The High Court itself is precluded from granting sanction in such a case under section 195, sub-section (1), clause (b) of the Criminal Procedure Code, as a Provincial Small Cause Court is not subordinate to it within sub-section (7), clause (c); nor can it interfere under sub-section (6) with an order of a District Judge revoking a sanction granted by such Small Cause Court.

Hamijuddi Mondol v. Damodar Ghose (2), *Girija Sankar Roy v. Binode Sheikh* (3) and *Muthuswami Mudali v. Veeni Chetti* (4) referred to.

Where the District Judge revoked a sanction granted by a subordinate Court to a District Magistrate on the ground that 'a sanction could not be granted to a third party,' and initiated proceedings under section 476 of the Criminal Procedure Code:—

Held, that he acted illegally in the exercise of his jurisdiction, and that the High Court had power to set aside his order under section 115 of the Code of Civil Procedure (Act V of 1908).

Hamijuddi Mondol v. Damodar Ghose (2) distinguished.

CIVIL RULE.

This was a Rule obtained by the petitioner, who was the plaintiff in the original suit, to show cause why the order of the District Judge sanctioning prosecution of the petitioner under section 476 of the Criminal Procedure Code should not be set aside.

The petitioner instituted a case against one Raghubar Malla, said to be residing at Budge-Budge, in the Small Cause

* Civil Rule No. 1800 of 1909, against the order of F. Roe, District Judge, 24-Pergunnahs, dated March 16, 1909.

(1) (1907) I. L. R. 34 Calc. 551.

(2) (1906) 10 C. W. N. 1026.

(3) (1906) 5 C. L. J. 222.

(4) (1907) I. L. R. 30 Mad. 382.

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Court of Alipur for recovery of Rs. 45, alleged to be due on account of a loan. The summons was affixed to the outer door of the "ordinary dwelling house" of the defendant. An *ex parte* decree followed. Two applications for execution of the decree were unsuccessful, the first for want of prosecution and the second because the defendant was not found at his native village, Azamgarh, in the United Provinces. The third application was successful. The defendant appeared in the Small Cause Court at Alipur and applied to have the *ex parte* decree set aside and the suit reheard. He denied the loan and denied having ever lived at Budge-Budge. His application was granted and a date fixed for the rehearing of the case. He then applied for the examination on commission of eight witnesses living in the district of Azamgarh. This last application being granted, notwithstanding strenuous opposition on the part of the plaintiff, the plaintiff asked leave to withdraw the suit. Leave was granted and the suit withdrawn.

The District Magistrate then applied to the Judge of the Small Cause Court to grant him sanction under section 195, sub-section (1), clause (b) of the Criminal Procedure Code, to prosecute the plaintiff for an offence under section 209 of the Indian Penal Code. The sanction was granted. On appeal, the District Judge revoked the sanction solely on the ground that a sanction could not be granted to a third party. The District Judge, however, himself ordered, under section 476 of the Criminal Procedure Code, the plaintiff to be prosecuted, as in his opinion there was a strong *prima facie* case that the petitioner had brought a false suit.

The plaintiff thereupon moved the High Court and obtained this Rule.

The Senior Government Pleader (Babu Ram Charan Mitra) (Mr. G. Sircar with him) showed cause. An inquiry is not absolutely necessary under section 476 of the Criminal Procedure Code. As an order under section 476, the District Judge had jurisdiction. The offence under section 209 of the Indian Penal Code was brought to the notice of the District Judge in the

course of a judicial proceeding, though it was in an appellate stage. Why should the privilege accorded to the humblest subject be denied to a Magistrate? This Rule cannot affect the Small Cause Court Judge's order: *Baperam Surma v. Gouri Nath Dutt* (1), *Jadunath Mahta v. Jagdish Chandra Deb* (2), *Queen-Empress v. Seshadri Ayyangar* (3), and *Pampapati Sastri v. Subba Sastri* (4).

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Babu Sarat Chandra Roy Chowdhury (*Babu Satya Charan Chandra* with him), in support of the Rule. If the Munsif (Small Cause Court Judge) has granted sanction, the District Judge cannot again do so. He may confirm or revoke, but not modify: see section 195 (7) of the Criminal Procedure Code. His order, therefore, cannot come under section 476 of the Criminal Procedure Code. Section 476 must be read with section 195 (1) (b).

[CHITTY J. What do you understand by the words "brought under its notice" in section 476 of the Criminal Procedure Code?]

"Brought under its notice" applies only to the Appellate Court and not the first Court. *Jadunath Mahta v. Jagdish Chandra Deb* (2) does not decide this point clearly. To give the District Judge jurisdiction in such matters, the judicial proceeding itself, in which the offence was said to be committed, must be before him by way of appeal or motion. No subsequent proceeding can give him the jurisdiction contemplated in section 476. [CHITTY J. It was a judicial proceeding from beginning to end.] That, I submit, is not the intention of the Legislature. The cases cited by the other side are distinguishable. The District Judge had no jurisdiction to order a prosecution under section 476: see the Full Bench case of *Begu Singh v. Emperor* (5). He also could not make a "complaint." [Senior Government Pleader. The Full Bench case refers only to section 476, but this order is really under section 195, the procedure only being under section 476.] [CHITTY J. But can we not ourselves direct a prosecution?]

(1) (1892) I. L. R. 20 Calc. 474.

(3) (1896) I. L. R. 20 Mad. 383.

(2) (1902) 7 C. W. N. 423.

(4) (1899) I. L. R. 23 Mad. 210.

(5) (1907) I. L. R. 34 Calc. 551.

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The Full Bench case is against that course. Besides that the Small Cause Court is not subordinate to the High Court within the meaning of section 195.

[CHITTY J. But can we not restore the sanction granted by the Small Cause Court Judge ?] As there is no appeal or motion against the order of revocation before this Court, your Lordships cannot interfere with that order. The main question before the Court is whether the order of the District Judge under section 476 was legal : *Hamijuddi Mondol v. Damodar Ghose* (1) and *Girija Sankar Roy v. Binode Sheikh* (2). Section 537 of the Criminal Procedure Code has no application to a Civil Bench. But the Criminal Bench may interfere under section 439, if the Government moves it. [CARNDUFF J. But we can call for the record ourselves and consider the whole matter.] Taking the case on the merits, the order of the Small Cause Court was unjust. It was also illegal, and the order of the District Judge setting aside the same was proper. Sanction to a stranger to the direct proceedings cannot be given : *In the matter of the Petition of Khepu Nath Sikdar v. Grish Chunder Mukerji* (3), *Habibur Rahman v. Munshi Khodabux* (4) and *Kali Charan Lal v. Basudeo Narain Singh* (5).

[CHITTY J. The last quoted case refers to gratification of a private grudge of an individual.] But sanction is required to prevent that as well. [CHITTY J. But each case must be considered on its own facts. We can at any rate take action under section 115 of the Civil Procedure Code.] But your Lordships cannot go behind the order moved against : *In re Gopal Siddeshwar Despande* (6), *Amir Hassan Khan v. Sheo Baksh Singh* (7), *Durga Das Rukhit v. Queen Empress* (8), *Muljat Ali Shaikh v. The Emperor* (9) and *In re Chundra Kant Ghose* (10).

Cur. adv. vult.

(1) (1906) 10 C. W. N. 1026.

(6) (1908) I. L. R. 32 Bom. 203.

(2) (1906) 5 C. L. J. 222.

(7) (1884) I. L. R. 11 Calc. 6 ;

(3) (1889) I. L. R. 16 Calc. 730.

L. R. 11 I. A. 237.

(4) (1906) 11 C. W. N. 195.

(8) (1900) I. L. R. 27 Calc. 820.

(5) (1907) 12 C. W. N. 3.

(9) (1905) 10 C. W. N. 222.

(10) (1888) 3 C. W. N. 3.

CHITTY AND CARNDUFF JJ. This is a Rule calling upon the District Magistrate of the 24-Pergunnahs to show cause why an order of the District Judge, dated the 16th March last, directing the prosecution under section 209 of the Indian Penal Code of the petitioner, Ram Prasad Malla, should not be set aside. The facts, out of which the case has arisen, are these:

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In June 1904, the petitioner, a resident of Budge-Budge, brought a suit for the recovery of Rs. 45 alleged to be due for principal and interest on account of a loan made in January 1902 to one Raghubar Malla, who was described in the plaint as then residing also at Budge-Budge. Summons was issued in due course, and, according to the process-server's report and the petitioner's own affidavit of the 18th July 1904, it was, in the absence of Raghubar Malla himself, affixed to the outer-door of his "ordinary dwelling-house" at Budge-Budge, as pointed out by the petitioner himself. On the following day the case was heard *ex parte* by the Munsif of Alipur, sitting in the Small Cause Court, and was decreed after a cursory examination on oath of the petitioner.

The first application for execution was made on the 17th September 1904, and this was apparently struck off for want of prosecution on the 9th January 1905. A second application is dated the 6th December 1905, and on it a certificate under section 224 of the Civil Procedure Code of 1882 seems to have been sent to Raghubar Malla's native district, Azamgarh, in the United Provinces, but returned unserved. A third attempt to execute the decree was made in the latter part of 1907 with better effect; for the notice required by section 248 of the Code of 1882 was duly served upon the judgment-debtor Raghubar Malla, in Azamgarh, with the result that he appeared in the Small Cause Court at Alipur and applied, on the 21st March 1908, to have the *ex-parte* decree against him set aside and the suit reheard. What purports to be his application was first submitted to the Court in the United Provinces, and is in the Persian character. It is not in the form of, or supported by, an affidavit; but, for the purposes of this proceeding and in

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view of the fact that he was assisted in making it by the District Magistrate through the Government Pleader, there is clearly no reason why it should not be referred to. It declared categorically that Raghubar Malla had not received any summons, that he had never been in Calcutta before, that he had never borrowed any money from the petitioner, that the petitioner's suit was false and had been brought maliciously, and that the first that he (Raghubar Malla) had heard of it was after the transfer of the decree for execution to Azamgarh. Raghubar Malla was, moreover, examined on oath by the Small Cause Court Judge on the 18th July 1908, and he then swore that he had never been to Budge-Budge, that there had been no service on him and that he had first come to know of the existence of the *ex-parte* decree in the preceding month of March. Much stress has been laid on the fact that his deposition stops short here and contains no express denial of the debt, the learned vakil for the petitioner arguing that, whereas his client has sworn to the truth of his case against Raghubar Malla, there is so far on record no assertion on oath to the contrary by Raghubar Malla, and that consequently there is no sure foundation for the prosecution of his client for the offence under section 209 of the Indian Penal Code of making a false claim in Court. The argument is ingenious, but it is nothing more, and it would be ridiculous to allow it to prevail. The sworn statement of Raghubar Malla in examination in chief was naturally confined to the only point that had for the purposes of section 108 of the former Code of Civil Procedure to be established; it might have been, but was not, extended beyond that point in the cross-examination to which Raghubar Malla was actually subjected; and, as it stands, apart even from the petition already referred to, the inference to be drawn from it and from the circumstances is that Raghubar Malla intended to deny everything. It may, moreover, be taken for granted that the District Magistrate has not tried to launch this prosecution without making sure that that person is prepared to be a witness, and there is at this stage, at all events, no need for entertaining a doubt on the point.

Raghubar Malla having deposed that there had been no service upon him, the petitioner was also examined. He then went back on the statement contained in his affidavit of the 18th July 1904, and affirmed that he had not himself accompanied the process-server, but had deputed another person to identify the defendant. We may observe in passing that it is difficult to reconcile these two sworn statements. The application under section 108 of the former Code was then granted, and it was ordered that the suit should be proceeded with, the 24th August 1908 being fixed for the hearing. The defendant next applied for the examination on commission of eight witnesses in the district of Azamgarh. This application, which was strenuously opposed by the petitioner, was granted, and the petitioner thereupon asked for leave to withdraw. Leave was given and the suit was accordingly withdrawn on the 5th August 1908.

We next find the District Magistrate moving the Munsif under section 195, sub-section (1), clause (b) of the Criminal Procedure Code, to sanction the petitioner's prosecution for the offence of making a false claim, and the Munsif, in a considered order, dated the 8th February 1909, granting the sanction prayed for. The learned District Judge, however, on being appealed to under sub-section (6) of the section, revoked the grant solely on the ground that "sanction could not be given to a third party to take up a prosecution;" but, having at the same time arrived at and recorded the opinion that "there was a strong *prima facie* case that the petitioner had brought a false suit in the Small Cause Court;" he evidently endeavoured to avoid a miscarriage of justice by himself directing the petitioner's prosecution. And this, it is manifest, he intended to do, and did, under section 476 of the Code, although the section itself is not mentioned in his order of the 16th March last.

This is the order which the petitioner moved us to set aside as having been made without jurisdiction; and, in view of the recent Full Bench decision in *Begu Singh v. Emperor* (1), we felt bound, not only to grant a Rule in the first instance,

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(1) (1907) I. L. R. 34 Cal. 551.

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but also to concede, when the Rule came on for hearing, that the District Judge's order could not stand. At the same time we are at a loss to appreciate the necessity for the learned District Judge's interference with the sanction granted by the Small Cause Court Judge, and we intimated that we would examine the record in order to ascertain and decide, after hearing the petitioner again on the whole case, whether on the merits and in the interest of justice, further orders in the direction of the petitioner's prosecution should not be passed.

The entire case has been reargued before us at great length and with much ability by the learned vakil for the petitioner, but nothing that he has been able to urge on the merits has influenced the opinion to which, as already indicated, we were inclined at the last hearing. The reported cases on the subject, which are very numerous, need not, we think, be discussed; for they are really all distinguishable, and the provisions of the law itself, as well as the principles underlying them, are simple, intelligible and reasonable. In the first place, a charge such as that we are now considering, depending as it does on intention and knowledge and involving the proof of a negative, is easily preferred, but by no means easily established; and, as prosecutions ending in failure are to be deprecated as being calculated to do harm rather than good, they ought not to be undertaken without considerable circumspection and care. Secondly, it is manifestly unfair to put a plaintiff or complainant, so to speak, out of the witness-box into the dock without giving him a full opportunity for proving his own case or showing that he had grounds for proceeding. Thirdly, offences of this kind are essentially—and they are so classified in the Penal Code—offences against public justice; whence it follows that they ought to be pressed primarily in the interests of public justice, and never as a means of satisfying a private grudge. For these reasons, the Legislature has interposed the safeguards provided by sections 195 and 476 of the Criminal Procedure Code, and with what has been laid down as to the expediency of insisting upon those safeguards being given full effect to and not evaded, we are in cordial agreement.

But, having said so much, we doubt if there is really anything more to be said : in other words, it seems to us that cases such as this should be dealt with mainly, if not entirely, on the broad lines indicated above, and that, if the conditions there suggested are observed, mere technicalities should not be permitted to interfere with the course of justice.

In this instance the undisputed and indisputable facts speak for themselves. On them, and no doubt, also on further information received, a responsible officer of the Government, who presumably had some grounds for his action, and whose motives must be assumed to be above suspicion, sought to prosecute the petitioner ; on them again, the Small Cause Court Judge has, after obviously careful consideration, come to the conclusion that the case was a proper one for sanction. And on them also the District Judge has arrived at the opinion that there is "a strong *prima facie* case against the petitioner." Add to all this the circumstance—to which it would be mere affectation to close one's eyes—that there is certainly nothing improbable in the suggestion that an *ex parte* decree on a false, though trifling, claim may, without much difficulty and with a fair prospect of success, be obtained and executed against a stranger hailing from a distant part of the country, and the simple questions arise—why should the petitioner not stand his trial, and why should the efforts of the District Magistrate towards vindicating public justice and checking abuse of the processes of the Civil Courts be summarily interfered with ? To this, there can, we think, be only one answer.

So much for the merits, in so far as they can, or ought to, be considered at this stage. But here we are confronted with a number of objections and difficulties. If they are insuperable, so much the worse ; but it must surely be our first care to overcome them, if they can be overcome, and see, if possible, that justice is done.

The Full Bench case already cited prevents us—as it ought to have prevented the learned District Judge—from taking action under section 476 of the Criminal Procedure Code and directing the petitioner's prosecution. The High Court

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is not, for the purposes of section 195, the Court to which the Small Cause Court Judge of Alipur is subordinate, and, therefore, we are precluded from ourselves sanctioning the prosecution under clause (b) of sub-section (1) of that section. A Division Bench of this Court has [see *Hamijuddi Mondol v. Damodar Ghose* (1)] held that the High Court cannot, under sub-section (6) of the same section, interfere with an order of a District Judge revoking a sanction granted by a Munsif. We doubt whether this ruling is consistent with that in *Girija Sankar Roy v. Binode Sheikh* (2), in which the learned Judges—one of whom was a party to the earlier ruling of the same year—held that the High Court could, under the sub-section referred to, interfere with the order of a District Judge approving a Munsif's sanction, and a Full Bench of the Madras High Court has [see *Muthuswami Mudali v. Veeni Chetti* (3)] expressly dissented from *Hamijuddi Mondol v. Damodar Ghose* (1). But we cannot dissent from the last-mentioned case without referring the point to a Full Bench. There remains, therefore, only the power of revision vested in us by section 115 of the present Code of Civil Procedure (corresponding with section 622 of the Code of 1882); and the question is whether it is open to us to exercise it here. It has been strongly urged that it is not, and in this connection *Hamijuddi Mondol v. Damodar Ghose* (1) has again been cited. That case, however, is distinguishable; for in it the District Judge had dealt with the matter on the merits and revoked the sanction for reasons relating thereto, and the learned Judges came to the conclusion that he had not exercised a jurisdiction not vested in him by law, nor acted illegally or with material irregularity. Here the position is very different, and we think that we are not unduly straining the language of the section by holding that it applies. The meaning to be attached to it, although it has been the subject of many rulings, cannot be said to have been as yet settled by authority; but one thing is clear on the face of it, and that is that it cannot be limited to the case of a subordinate Court acting altogether

(1) (1906) 10 C. W. N. 1026.

(2) (1906) 5 C. L. J. 222.

(3) (1907) I. L. R. 30 Mad. 382.

without jurisdiction. It expressly covers the case of a Court "acting in the exercise of its jurisdiction illegally or with material irregularity," and what we have to consider is whether this is not such a case. We have already observed that we do not understand the learned District Judge's reason for thinking that he was bound to overrule the Small Cause Court Judge. There is certainly nothing in the statute law to limit the grant of sanction to a party to the proceeding in connection with which the offence aimed at was committed, and the only authority that the learned vakil could cite in support of the rule suggested by the District Judge's order is *In re Chundra Kant Ghose* (1). In that case an application for sanction, unsigned and unverified, had been filed before a Munsif ostensibly on behalf of the defendant in a civil suit. The defendant repudiated it and declared that he had no desire to prosecute, and the Munsif found that it had emanated from a private person, who was not a party to the suit. The sanction was nevertheless granted, and we venture to say that we entirely agree with all that the Division Bench of this Court said in setting it aside. But "a case is only an authority for what it actually decides," and there is clearly nothing in the learned Judge's judgment to support what would, in our view, be the astounding proposition that sanction to prosecute for an offence against public justice should be withheld from a public officer as such. Surely there could be no better recipient of such sanction, and, in our opinion, the learned District Judge was acting illegally in the exercise of his jurisdiction, when he laid down and followed as binding a rule to the contrary.

The result is, that this Rule is made absolute, and that the whole of the District Judge's order of the 16th March last is set aside. The sanction originally granted by the Small Cause Court Judge and revoked by that order is thus restored; and it will now be open to the District Magistrate to proceed in accordance with law.

Rule absolute.

S. M.

(1) (1888) 3 C. W. N. 3.

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APPELLATE CRIMINAL.

*Before Sir Lawrence H. Jenkins, K.O.I.E., Chief Justice, and
Mr. Justice Caspersz.*

1909

July 23.

EMPEROR

v.

HAMID ALI.*

Opium, illegal possession of—Opium Act (I of 1878) ss. 9 (c), 10—Mere possession contrary to the Act without guilty frame of mind—Respective liabilities of owner of boat and crew—Presumption of commission of offence under the Act—"Conveyance"—Boat.

Under sections 9 (c) and 10 of the Opium Act (I of 1878), mere possession of opium without being able to account for it satisfactorily, apart from any frame of mind, is an offence.

The owner of a boat in which opium is found is in possession of it, but not the crew when they are neither owners nor jointly interested with him in any venture as an incident of which possession might be attributed to them.

Where the owner of a boat alleged that opium was carried on board by a passenger without his knowledge, but there were circumstances disproving his story :—

Held, that as he had not satisfactorily accounted for its possession, it must be presumed, under section 10, that it was opium in respect of which he had committed an offence under the Act.

Quære : whether a boat in which opium is carried is a "conveyance" used in carrying it so as to be liable to confiscation on conviction of the owner under the Act.

THE three appellants, Hamid Ali, Serajuddin and Akkil Ali, were put on trial before Muhamed Iskander Ali, Deputy Magistrate of Noakhali, charged under section 9 (c) of the Opium Act, and were acquitted on the 9th January 1909. The appellant Serajuddin was the owner of a boat plying between Calcutta and Chittagong, and the other two were the crew. On the 9th December 1908, a Salt Inspector and his staff boarded the boat at the Badamia *khal*, and on search found a quantity of contraband opium. There was a fourth man on the boat, named Ainuddi, who, it was

* Government Appeal No. 9 of 1909, against the order of M. Muhamed Iskander Ali, Deputy Magistrate of Noakhali, dated Jan. 9, 1909.

alleged, escaped and was absconding. The appellants admitted the finding of the opium on the boat, but they explained the fact by stating that Ainuddi got on board at Hatia as a passenger and had the opium with him without their knowledge. The Magistrate accepted the explanation as satisfactory and acquitted them. The Government of East Bengal and Assam, thereupon, filed the present appeal.

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Mr. Donogh, for the Crown.

Babu Kumar Shankar Roy, for the accused.

JENKINS C.J. AND CASPERSZ J. This is an appeal by the Government from the acquittal of three men, Hamid Ali, Serajuddin and Akkil Ali, who were charged under section 9 of the Opium Act (I of 1878) with possessing opium. The charge of possession rests on the fact that it was in a boat, in which these three men and another were. For the purposes of an offence under section 9, clause (c), nothing is necessary beyond possession of the opium. There is no particular frame of mind required, so that what we have to consider is, first of all, whether these three accused or any one of them was in possession of the opium. As against two of the accused, that is to say, Hamid Ali and Akkil Ali, there is, I think, a complete failure on the part of the prosecution to show possession, for the evidence so far as it goes is that they were not owners of the boat, nor jointly interested with Serajuddin in any venture as an incident of which we might attribute to them possession of the opium, but they were merely two of the crew. On the evidence before us we are unable to hold that these two accused were in possession of the opium.

With regard to Serajuddin, the case is different, for he was the owner of the boat, and I do not understand the learned Magistrate, by whom he has been acquitted, as suggesting that the opium was not actually found in the boat. On the evidence I hold as a fact that the opium was in the boat, and the boat being his, I hold in the circumstances of the case that he was in possession of the opium. Then we

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have to consider the terms of section 10 of the Act which provides that "in prosecutions under section 9, it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily, is opium in respect of which he has committed an offence under this Act." The learned Magistrate seems to have thought that the accused person, that is to say, Serajuddin, had accounted satisfactorily. What he says is this: "The accused admit that the articles seized by the Salt Officers were found in their boat. But they explained this fact by saying that the fourth man (Ainuddin) got into their boat at Hatia as a passenger with these articles, and that they did not know that there was opium among them." There is no evidence of any witnesses to this effect, but some of the accused have at different times made statements suggesting this. On the other hand, we find that the immediate statement made by one of the accused is in direct conflict with it, because his version is this, "We are four co-workers in the *sampan*. Two men, Serajuddin and Ainuddin, carry on business, sell articles;" and that is manifestly inconsistent with what commended itself to the Magistrate as satisfactorily accounting for the opium. But more than that, we have the very significant circumstance that when the boat was boarded, Serajuddin threw over-board a *handi*, which was recovered and in the process of recovering which, it is sworn, a piece of opium dropped out. Even if this be treated as problematical, it is established that when the *handi* was brought into the boat and examined, it was found that it contained a quantity of opium. This is very significant and goes to show that the account now given by Serajuddin is one which cannot be accepted. In the circumstances, I hold that it has been established by the prosecution that Serajuddin did possess opium, and he has been unable to account satisfactorily for his possession. Therefore, he must be convicted under section 9 of the Opium Act. It has been stated before us that he was convicted on another occasion, but there is no proof of that. We cannot act on that statement, although it may very well be, as the learned counsel for the prosecution says, that the

absence of proof is due to the fact of the acquittal by the Magistrate. In the circumstances, it certainly would not be worth while calling for evidence on this point. We, therefore, determine the amount of punishment irrespective of this allegation. We fine him a sum of Rs. 250, and in default he will undergo three months' rigorous imprisonment. We do not propose to direct confiscation of the conveyance, even if a boat is a "conveyance," as to which we express no opinion.

E. H. M.

Appeal allowed.

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CRIMINAL REVISION.

Before Mr. Justice Coxe and Mr. Justice Ryves.

FAIZ ALI v. EMPEROR.*

1909
Aug. 20.

Emigration—Unlawful recruitment—Assam Labour and Emigration Act (VI of 1901) s. 164.—“Emigrate,” meaning of—Inducement to go from a place in British India to Fiji—Subsequent inducement at another place to proceed to Sylhet—Locus delicti—Jurisdiction of Criminal Court—Criminal Procedure Code (Act V of 1898) s. 177.

A recruiter, who induces a person at Cawnpore to go to Fiji, but on the way takes him to a coolly depôt at Arrah and induces him to proceed to Sylhet, in contravention of the Assam Labour and Emigration Act, commits no offence under s. 164 of Act VI of 1901 at Cawnpore, but only at Arrah, and a Magistrate of the latter place has jurisdiction to try such offence.

THE petitioner was tried by the District Magistrate of Shaha-
bad and convicted under section 164 of the Assam Labour and
Emigration Act, on the 26th April 1909, and sentenced to a
fine of Rs. 500, and in default to three months' rigorous im-
prisonment. The sentence was reduced on appeal. It appear-
ed that he induced a cooly, named Lal Bahadur, at Cawnpore,
to go to Fiji, which he represented to be near Calcutta. Lal
Bahadur and a number of others were brought down from
Cawnpore and were made to alight at Arrah and taken to a cooly
depôt. Whilst there they learned that they were to be sent to

* Criminal Revision No. 819 of 1909, against the order of J. Johnston, Officiating District Magistrate, dated April 26, 1909.

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Sylhet. They were entrained and put in charge of a *sardar* for despatch to Sylhet, but on the journey they met some military bandsmen, who advised them not to go to Sylhet. Accordingly at Bankipore they got down forcibly and informed the police, who took them to a Magistrate. They were sent back to Arrah and, in consequence of certain statements made by them, the petitioner was put on his trial.

Babu Dasharathi Sanyal (with him *Babu Abani Bhushan Mukerjee*), for the petitioner.

Mr. Orr (Deputy Legal Remembrancer), for the Crown.

COXE AND RYVES JJ. The petitioner in this case has been convicted under section 164 of the Assam Labour and Emigration Act, 1901, for inducing one Lal Bahadur Kurmi to emigrate from Arrah, in contravention of the notification published under the Act, prohibiting all persons from recruiting, inducing, engaging or assisting any persons to emigrate from any district in Bengal. The petitioner obtained this Rule from this Court on the District Magistrate to show cause why the conviction and sentence of the petitioner should not be set aside on the ground that the facts found did not constitute the offence of which the petitioner had been convicted.

It appears that the accused induced Lal Bahadur to leave Cawnpore in order to go to Fiji to work. On the way they stopped at Arrah, and then the accused told Lal Bahadur that he would have to go to Sylhet, and placed him in a train in charge of a *sardar* for the purpose of ultimately going to that place.

It has been argued on behalf of the petitioner that the offence, if any, was committed and completed in Cawnpore, and that consequently the authorities in Arrah had no jurisdiction to deal with the matter. We think that there would be a good deal of force in this contention if, as a matter of fact, Lal Bahadur had been induced to leave Cawnpore in order to go to Sylhet. It seems to us that if the man had originally been induced to go to Sylhet to labour there for hire, it would be difficult to hold that there was a fresh emigration at every

place at which he might stop on his journey. But it seems clear that Lal Bahadur was not induced to leave Cawnpore in order to go to labour at Sylhet, but in order to go to Fiji, and, therefore, no offence under section 164 of the Act was committed at Cawnpore. That section provides that "whoever knowingly recruits, engages, induces or assists, or attempts to recruit, engage, induce or assist, any person to emigrate in contravention of any of the provisions of this Act or of any notification for the time being in force thereunder, shall be punishable with imprisonment," and the word "emigrate" is defined as meaning the departure of a native of India for the purpose of labouring for hire in a labour district.

It is clear, therefore, that Lal Bahadur did not emigrate within the meaning of this Act from Cawnpore, and was not induced to emigrate therefrom. It was not until he arrived at Arrah that any attempt was made to induce him to depart from the place where he then was, for the purpose of labouring for hire in Sylhet. There is no reason why persons, who are actually on a journey from one place to another, should not be protected from unlawful recruitment just as well as persons living in their villages. We think that the facts found in the case do constitute the offence charged. The Rule is accordingly discharged.

Rule discharged.

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FULL BENCH.

*Before Sir Laurence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Stephen,
Mr. Justice Mookerjee, Mr. Justice Coxe and Mr. Justice Chatterjee.*

1909
Aug. 28.

PIRTHICHAND LAL CHOWDHRY

v.

BASARAT ALI.*

*Landlord and tenant—Record-of-Rights—Presumption of permanency of rent—
Bengal Tenancy Act (VIII of 1885), as amended by Bengal Acts III of 1898
and I of 1903, ss. 50, 105, 115.*

When an application is made under section 105 of the Bengal Tenancy Act, as amended by Bengal Acts III of 1898 and I of 1903, for settlement of rent, after the final publication of the record-of-rights, the tenant is entitled, in view of the provisions of section 115 of the Bengal Tenancy Act, to the benefit of the presumption under section 50 of the same Act.

Radha Kishore Manikya v. Umed Ali (1) approved.
Secretary of State for India v. Kajimuddi (2) distinguished.

REFERENCES to Full Bench.

These two references arose out of suits brought by the landlord under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rents.

The material portion of the order of reference (by MOOKERJEE J.), in Appeal from Appellate Decree, No. 1477 of 1908, was as follows :—

“ This is an appeal on behalf of the landlord against a decree made in proceedings under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rents. The record-of-rights was finally published on the 18th February 1907. On the 8th April following, the landlord made an application under section 105 for settlement of a fair and equitable rent payable by the tenant respondent. The tenant pleaded that he was a *raiya* at a fixed rent, and therefore his rent was not liable to be altered. The Assistant Settlement Officer overruled this objection, and on the 12th August 1907 settled what he considered to be a fair and equitable rent. The effect of the rent so settled was to enhance the rent previously paid by one-and-a-half anna in the rupee. The

* References to Full Bench in Appeal from Appellate Decree, No. 1477 of 1908, and Letters Patent Appeal No. 118 of 1907.

(1) (1908) 12 C. W. N. 904.

(2) (1899) I. L. R. 26 Calc. 617.

tenant appealed to the Special Judge and reiterated the objection that his rent was not enhanceable as he was a *raiyat* at a fixed rent. In support of this contention he relied upon rent-receipts from 1842 to 1887, which apparently showed that he had held the land at a uniform rent for more than twenty years. On this basis it was argued on behalf of the tenant that, under section 50 of the Bengal Tenancy Act, he must be presumed to have held at the same rent from the time of the permanent settlement and the rent was consequently not liable to be increased except on the ground of alteration of the area of the holding, which was neither alleged nor proved by the landlord. The Special Judge held that the presumption under section 50 was applicable and had not been rebutted by the landlord. He, therefore, decreed the appeal and dismissed the application for settlement of rent. The landlord has now appealed to this Court, and on his behalf the decision of the Special Judge has been assailed on the ground that, in view of the provisions of section 115 of the Bengal Tenancy Act, the presumption under section 50 is not applicable to the tenancy in question. In support of this proposition, reliance has been placed upon the decision of Mr. Justice Brett in *Ram Sewak Chaudhuri v. Mohant Bansi Das* (Appeal from Appellate Decree, No. 520 of 1907, decided on the 24th March 1909). In support of the contrary view, reliance has been placed by the respondent upon the decision of Mr. Justice Das in *Maharaja Radha Kishore Manikya Bahadur v. Umed Ali* (1). It is conceded by the learned vakils on both sides that the views taken in these two cases cannot be reconciled. Under the Rules of the Court (Chapter V, rule 1), therefore I am bound to refer the matter to a Full Bench for decision. The question, which I refer for decision, is—“whether, when an application is made under section 105 of the Bengal Tenancy Act for settlement of rent after the final publication of the record-of-rights, the tenant is entitled, in view of the provisions of section 115 of the Bengal Tenancy Act, to the benefit of the presumption under section 50.”

“I may add that reference was also made to the case of *Secretary of State for India in Council v. Kajimuddi* (2), in which it was ruled that, when a suit is brought by a tenant for the purpose of testing the correctness of the decision of a Revenue Officer in regard to the entry as to the status of a *raiyat* in a record-of-rights, the provisions of section 115 against the presumption as to a fixed rent have no application and the tenant is entitled to the benefit of such presumption. This decision has no direct bearing upon the question raised before me, but it was suggested by the learned vakil for the respondent that if the view taken in this case be correct, the view taken by Mr. Justice Das in *Maharaja Radha Kishore Manikya Bahadur v. Umed Ali* (1) logically follows from it.”

The order of reference (by JENKINS C.J. and MOOKERJEE J.) in Letters Patent Appeal No. 118 of 1907 was as follows:—

“One of the questions that arises in this appeal is whether section 115 of the Bengal Tenancy Act negatives the presumption under section 50. This question has been already referred to a Full Bench, and we refer the same question

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in this case also to a Full Bench in the terms of the reference made in Special Appeal, No. 1477 of 1908. The reference is necessitated by the decision in *Secretary of State for India in Council v. Kajimuddi* (1) and the point on which we differ from that decision is as to the effect of section 115 of the Bengal Tenancy Act on section 50. This reference will come on with the other reference."

Babu Jogendranath Mukherji, for the appellant, in Appeal from Appellate Decree, No. 1477 of 1908. Section 115 of the Bengal Tenancy Act lays down the law in clear terms, and renders the presumption under section 50, clause (2) of the Bengal Tenancy Act inapplicable to the tenancy after the particulars mentioned in section 102, clause (b), have been recorded under Chapter X of the Act. *Maharaja Radha Kishore Manikya Bahadur v. Umed Ali* (2) was wrongly decided.

[JENKINS C.J. Doss J. seems to follow the case of *Secretary of State for India in Council v. Kajimuddi* (1). He does not go beyond it.]

That case is distinguishable. It dealt with khas mehals, which are not permanently settled, and therefore section 50 can have no application. See also sections 3, clause (12), 191 and 192 of the Bengal Tenancy Act.

[JENKINS C.J. What is the point of time at which, according to you, the record may be said to have been made under Chapter X of the Bengal Tenancy Act?]

The safest point to take would be the final publication of the record-of-rights.

[COXE J. But see section 109D. The notes referred to in the section cannot be made till after the final publication.]

The record being published after several stages of proceedings for the elimination of error, the law gives it some evidentiary value (*vide* section 103B), and the person, who controverts the entries in a record finally published, must absolutely establish his case.

Shambhu Chandra Hazra v. Purna Chandra Pal (3) is, I admit, against me.

(1) (1899) I. L. R. 26 Calc. 617.

(2) (1908) 12 C. W. N. 904.

(3) (1907) I. L. R. 35 Calc. 176.

[COXE J. The record should be brought into a line with all orders for correction as provided in section 107. Can section 115 be interpreted without reference to section 107 ?]

These corrections can be made and noted all the same, whatever the interpretation of section 115 may be. This section merely furnishes a rule of evidence.

[CHATTERJEE J. What is exactly the force of the expression "recorded under this Chapter" ?]

It was held in *Shambhu Chandra Hazra v. Purna Chandra Pal* (1) that the record as published is to be taken for granted, and, if necessary, the record is to be questioned under section 106.

[COXE J. But when an entry is made under section 109D, what becomes of the original entry ?]

It goes : *Macdonald v. Babu Lal Purbi* (2).

Babu Dwarkanath Chakravarti (Babu Upendra Nath Chatterjee with him) in Letters Patent Appeal No. 118 of 1907. The tenant may apply under section 106 while the landlord's application under section 105 is pending. He having omitted to take any steps under section 106, the record stands unaffected. It would be the duty of the Settlement Officer to determine the claim of the tenant first. The object of the sections is best shown by the "Reasons" of the Act : note the several amendments of the Act and see section 103B. There is thus a presumption of correctness of record. But there is no such presumption as to the status of the then tenant, and very wisely.

[JENKINS C.J. Would the tenant be entitled to the presumption in a suit under section 106 ?]

Yes. But when the record has not been challenged under section 106, it must be accepted in subsequent proceedings.

"Finally published" must have reference to final publication or the final act of the officer : *Shambhu Chandra Hazra v. Purna Chandra Pal* (1), *Dengu Kazi v. Nobin Kissori Chowdhurani* (3). The latter case clearly explained the difference between 'a dispute,' 'a suit' and 'an objection.' If the

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(1) (1907) I. L. R. 35 Calc. 176.

(2) (1904) 4 C. L. J. 519.

(3) (1897) I. L. R. 24 Calc. 462.

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word "recorded" meant before 1898 'the record as finally published,' the meaning is the same still.

Section 115, however, it must be remembered, is not a very dangerous section, as it deprives the tenant of a presumption only. Each new legislation is carrying the indulgence to the tenant further and depriving the landlord of his right: *Macdonald v. Babu Lal Purbhi* (1).

[MOOKERJEE J. In that case, the record-of-rights was prepared pending a civil suit and the entries were produced in evidence.]

But if in these proceedings the plea of the defendants is entertained, the question of limitation and stamp must be overlooked.

Babu Naliniranjan Chatterjee (*Babu Harendra Krishna Mukherji* with him) in Appeal from Appellate Decree, No. 1477 of 1908. "Recorded in this Chapter" in section 115 includes all subsequent proceedings. Were it not so, much of the section would be useless. The fact that section 115 remains unchanged even now shows that my contention is right.

The conflict of decisions does not affect my case. In *Radha Kishore Manikya Bahadur v. Umed Ali* (2) the record had been completed under Chapter X.

[JENKINS C.J. Is there any case which directly decides that the presumption continues?]

There is none. Under the original Act, the officer is bound to decide all questions as regards the tenancy.

[MOOKERJEE J. Evidently in this case he has done so without opposition. And the tenants are always allowed to raise the question of status under section 105.]

In a proceeding under section 105, I am certainly entitled to show that my rent is not enhanceable. If, moreover, I can raise an objection under section 106, can I not raise the same objection in a suit by the landlord for enhancement of rent?

Finally, I submit that a second appeal does not lie. If the Court says that the rent cannot be enhanced, it really settles

(1) (1904) 4 C. L. J. 519.

(2) (1908) 12 C. W. N. 904.

the rent at the present rate : *Rameswar Singh v. Bhubaneswar Jha* (1).

Babu Umakali Mukerjee (*Babu Provashchandra Mitter* with him) in Letters Patent Appeal No. 118 of 1907. Section 105 should not be read distributively. Other sections must be read with it, otherwise I would be robbed of a valuable privilege : see section 103B.

Section 115 does not apply to rent suits generally, and does not come into operation, until all possible proceedings under the Chapter have been exhausted. If after the final publication neither party takes any step under section 105 or section 106, I can raise the question in a suit. Why can I not raise the same question in a proceeding under section 105 ? It must be remembered that sections 105 and 106 are both only enabling sections. This presumption in favour of the landlord is rebuttable : lastly, I contend that the decision would operate as *res judicata* and I would be in a most insecure position ever after, if I am shut out here.

Babu Dwarkanath Chakravarti, in reply. I concede that section 105 is an enabling section. Section 115 becomes inapplicable, if you allowed the records to remain unchallenged by suit under section 106. Suppose I withdraw the application and file a suit, would the tenant be entitled to rely on section 50 ?

[MOOKERJEE J. But see section 109.]

I shall then be entitled to rely on section 115.

[MOOKERJEE J. The question does not arise in this case.]

[JENKINS C.J. As to the right of appeal you need not argue that point. What do you say to the argument that section 50 applies to all suits and proceedings under the Act ?]

"Proceeding" would only include a suit under section 106.

Babu Jogendranath Mukherji in reply. In cases of conflict of views, see *Rajib Panda v. Lakhan Sindh Mahapatra* (2).

Cur. adv. vult.

(1) (1906) I. L. R. 33 Calc. 837.

(2) (1899) I. L. R. 27 Calc. 11, 15.

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The judgment of the majority of the Full Bench (JENKINS, C.J., STEPHEN, MOOKERJEE and CHATTERJEE JJ.) was as follows :—

In this case the record-of-rights under Chapter X of the Bengal Tenancy Act was finally published on the 18th February 1907 and the defendant was recorded in the *khatian* as a mere occupancy *raiyat*. On the 8th of April following, the landlord made an application for settlement of rent under section 105 of the Bengal Tenancy Act. The defendant pleaded that he was a *raiyat*, at a fixed rent, which was not liable to enhancement. The Settlement Officer overruled the plea of the tenant and enhanced his rent by 1½ annas in the rupee. On appeal by the tenant the Special Judge held that as he proved payment of rent at a uniform rate for more than twenty years, he was entitled to the benefit of the presumption under section 50 of the Bengal Tenancy Act, and that presumption not having been rebutted his rent was not liable to enhancement. The landlord appealed to this Court, and it was contended on his behalf that as the status of the tenant had been finally published under section 102, clause (b), and there had been no suit under section 106, the provisions of section 115 of the Bengal Tenancy Act barred the presumption under section 50. As there was a conflict between the decision of Mr. Justice Brett in *Ram Sewak Chaudhuri v. Mohant Bansi Das* (Second Appeal No. 520 of 1907 decided on the 24th March 1909), and that of Mr. Justice Lal Mohan Doss in *Maharaja Radha Kishore Manikya Bahadur v. Umed Ali* (1), the following question was referred for the decision of the Full Bench "whether when an application is made under section 105 of the Bengal Tenancy Act for settlement of rent after the final publication of the record-of-rights, the tenant is entitled in view of the provisions of section 115 of the Bengal Tenancy Act to the benefit of the presumption under section 50." A reference was also made to the case of the *Secretary of State for India in Council v. Kajimuddi* (2), as supporting the view of Mr. Justice Doss.

(1) (1908) 12 C. W. N. 904.

(2) (1899) I. L. R. 26 Calc. 617.

Chapter X of the Bengal Tenancy Act has undergone several amendments, and it cannot be said that the successive amendments have made the law clearer of comprehension or easier of practical application. The chief difficulty in answering the question referred arises from the fact that section 115 has remained the same as it was under the original Act VIII of 1885, while the previous sections of the Chapter have undergone repeated and varied changes. Reading the Chapter as it stood before amendment by Bengal Act III of 1898, the Revenue Officer was under section 103 to ascertain and record the particulars required by section 102, and when so desired by the landlord or the tenant make a settlement of a fair and equitable rent under section 104, clause 2. When he had completed his record under the previous section, he was under section 105 to publish a draft record for a month and receive and consider any objection to any entry in the record: under section 106 he was also to hear and decide any disputes regarding any entry in or omission from the record, and then finally frame the record and publish it locally, such publication being conclusive evidence that the record had been duly made under the Chapter. The parties, therefore, had opportunities of watching and objecting to the proceedings (1) by objections under section 105, which were decided summarily and subject to an appeal to the Special Judge, (2) by disputes under section 106 which were subject to an appeal to the Special Judge and a second appeal to the High Court, except in the case of rents settled under clause 2 of section 104. Under section 109 only undisputed entries were presumed to be correct, and finally section 115 provided that the presumption under section 50 shall not thereafter apply. Under the law then as it stood before Bengal Act III of 1898, the tenant would be entitled to the benefit of the presumption under section 50 in a proceeding under section 105 or 106. Under the amending Act of 1898 the old section 105 was altered into section 103A, which provided for the publication of the draft record and the receiving and consideration of objections to entries in or omissions from the record, and after the disposal of such objections

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the final framing of the record and final publication thereof, such publication being conclusive evidence that the record had been duly made under the Chapter. Section 103B provided that a certificate by the Revenue Officer that the record had been published under Chapter X would be conclusive evidence of such publication, and every entry in a record-of-rights should be presumed to be correct, until the contrary is proved.

The changes, therefore, were (i) that objections not only as to entries but also as to omissions from the record might be considered under section 103A, (ii) that the final publication would follow the disposal of the objections as to entries and omissions, and need not wait for the decision of disputes under section 106, which are for the first time called suits, and required to be initiated by plaints upon stamp-paper and to be filed within two months from the date of the certificate of final publication. Section 105 provided for the settlement of a fair and equitable rent in respect of the land held by the tenant: clause 4 of this section provided that the existing rent was to be presumed to be fair and equitable, and the rules laid down in the Act for the guidance of Civil Courts in increasing or reducing rents must be followed. The same time (two months) was allowed for a suit under section 106 or an application for settlement under section 105. Section 107 provided that the decision of the Settlement Officer in all proceedings for the settlement of rents and all proceedings under section 106 should have the force and effect of a decree between the parties, and should be finally subject to a revision under section 108 or appeal under section 109A, and further directed that a note of all rents settled and of all decisions of disputes should be made in the record-of-rights finally published under section 103A, and such note considered a part of the record. The wording of section 115 remained the same as before.

There was a further amendment of section 106 by Bengal Act I of 1903 and the time limit for the suit was raised to three months from the date of the final publication, but the other alterations are not material to the present discussion. The law as it stood after these amendments of 1898 and 1903 is the

one that would apply to the present case. The wording of section 115 is plain enough and might without anything else lead to the conclusion that as soon as the final record is framed under section 103A, clause (2), the particulars mentioned in section 102, clause (b), should be taken to have been recorded, and the presumption under section 50 should cease to apply thereafter to that tenancy. From a consideration of the history of the Chapter, however, it would appear that from 1885 to 1898 the tenant had the benefit of the presumption under section 50 in all proceedings under sections 105 and 106. By the Act of 1898 these proceedings were to commence within two months of the final publication, so that, if the final publication were to be the point of time after which the presumption was not to apply, the tenant would necessarily lose the benefit of the presumption in these proceedings without any opportunity having been given to him to avail himself of it in a regular contest coming up to the highest Court. This presumption, although it might in one sense be considered a rule of evidence, is to the tenant in this province a cherished right granted to him so long ago as 1859 in consideration it may be of his general ignorance and incapacity to cope with the superior intelligence and ways and means of his landlord. It can hardly be supposed that the Legislature meant to take away this right by implication. On the other hand it is quite conceivable that the Legislature thought the wording of section 115 which is "recorded under this Chapter" and not "finally published" was wide enough to embrace proceedings under sections 105 and 106 as parts of the final record as expressly provided by section 107. It is not necessary to consider in this case whether recorded means recorded after all chances of an amendment of the record under any other provision of the Chapter are over, including a suit as contemplated by section 111.

In this case the application by the landlord was under section 105, and it has been contended before us that the tenant not having brought a suit under section 106 was not entitled to the advantages of such a suit in the proceedings and to plead fixity of rent. He has, however, pleaded it, and both the lower

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Courts have considered it without apparently any objection by the appellants. It appears that sufficient attention has not always been paid to the distinction between a suit under section 106 and a proceeding for settlement under section 105 and cases initiated by an application headed under section 105 have often come up in second appeals, which have been entertained as competent notwithstanding the provisions of section 109A, clause 3. In the case of *Mathura Mohun Lahiri v. Uma Sundari Debi* (1), it was held that when the lower Courts decided a question with regard to the prevailing standard of measurement, the area of lands in the possession of tenants or the liability of the tenants to pay excess rent for excess lands upon an application for a settlement of rent, a second appeal lay to the High Court.

In the case of *Kalkiishore Pal v. Gopi Mohun Roy Chowdhury* (2), it was held that, if matters properly coming under sections 105 and 106 are not kept separate, a second appeal lies in respect of matters properly coming within section 106. In the case of *Raj Kumar Pratap Sahay v. Ram Lal Singh* (3), it was held that when in a proceeding under section 105 the Special Judge holds that there was no excess land, and therefore no rent to be settled, a second appeal lay to the High Court.

In the case of *Preobast Narain Singh v. Murat Bai* (4), in a proceeding under section 105 where the Special Judge held that the claim for assessment of rent had been barred by limitation, it was held that the decision was not one settling a rent and therefore a second appeal lay. In the case of *Naimuddin Shaikh v. Ram Rangini Dasi* (5), it was held that no second appeal lay against an order settling rent, although the question of the status of the tenant was raised and decided in the Court below: it does not appear whether the case was governed by the law as it stood before the amendment of 1907. It shows, however, that the tenant was allowed to plead the presumption

(1) (1897) I. L. R. 25 Calc. 34.

(3) (1907) 5 C. L. J. 538.

(2) (1907) 5 C. L. J. 34n.

(4) (1909) 13 C. W. N. ccriv.

(5) (1909) 13 C. W. N. ccxx.

under section 50. There are many unreported cases also holding that a second appeal would lie, if the Settlement Officer decided any matter, which would properly come under section 106, but which came in inadvertently or as an ancillary issue in a proceeding under section 105. It is quite possible that, the same officer having to deal with proceedings under section 105, and suits under section 106, matter coming under either section are indiscriminately dealt with in the same proceeding, even if it is headed as one under section 105. In the present case also, although the proceeding was one under section 105, a second appeal has been entertained probably without objection, and in fact the appellant would be out of Court on his own admission, if he were to contend that the decision as to status was *ultra vires* in a proceeding under section 105 and therefore no second appeal lay. Considering, therefore, the practice that has prevailed for a series of years, I think the tenant in this case was entitled to the benefit of the presumption under section 50, and in this view of the matter I would answer the question referred in the affirmative.

The case of the *Secretary of State for India v. Kajimuddi* (1) is a case of a tenant claiming the benefit of the presumption under section 50 in a suit to contest the correctness of an entry in the record-of-rights, and has no direct application to the facts of this case, except so far as it rests on the view that "section 115 seems to contemplate a case in which a raiyat is seeking to get the benefit of the presumption for a period subsequent to the time, when the record-of-rights was framed." With this view I am unable to agree, for in my opinion it disregards the plain terms of the section, which are general in expression and contain nothing to justify the limited construction that has been placed on them. The case was one governed by the law as it stood before the amendment of 1898. There can be no doubt that a suit of the nature brought there would lie as being within the contemplation of section 111, but after the tenant had omitted to appeal to the Special Judge or to take proceedings

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under section 106 he could not be heard to complain that he had been deprived of a cherished right, when his claim for the benefit of the presumption under section 50 was confronted by the provisions of section 115.

The result is that the Appeal No. 1477 of 1908 is dismissed with costs before the Division Bench and this Bench.

The Letters Patent Appeal 118 of 1907 is dismissed and the judgment of BRETT J. affirmed. The respondent is entitled to his costs before the Division Bench and this Bench.

COXE J. I have had the advantage of reading the judgment of Mr. Justice Chatterjee, and I agree generally that in proceedings under section 105 of the Bengal Tenancy Act, the tenant is entitled to the benefit of section 50. This particular case fell under the Tenancy Act as amended by Bengal Act III of 1898. Under section 107 (2) of that Act a note of all decisions of disputes under section 105 became a part of the record-of-rights, and it seems to me a reasonable inference that the particulars in respect of a tenancy, which were the subject of a dispute under section 105, were not regarded as finally recorded within the meaning of section 115, until that note had been made. It seems reasonable to suppose that the Legislature, which, as Mr. Justice Chatterjee points out, cannot have wished to hamper the tenants in obtaining a revision of the record by the Revenue Officer, left section 115 unaltered, after the alteration of sections 105 and 106, because it was supposed that section 107, sub-section (2), would have the effect of keeping the tenant's right to plead section 50 alive, until cases under sections 105 and 106 were disposed of.

It may perhaps be open to doubt whether the words "a note of all rents settled and of all decisions of disputes by the Revenue Officer under section 105" in section 107, sub-section (2), necessarily include a note of a decision by a Revenue Officer that the tenants are raiyats at fixed rates, and that their rents therefore were not open to settlement. Rents settled under section 105 are not incorporated by the Act in the record-of-rights like rents settled under section 104F. If then a tenant

were recorded in a record-of-rights as an ordinary occupancy raiyat, and the landlord subsequently applied for a settlement of rent under section 105, then it may be argued that, even if the tenant succeeded in showing that he was a raiyat at fixed rates, no change would be necessary in the entries of recorded rents, and consequently the particulars referred to in section 115 should be regarded as final, even before the decision of the landlord's application. And it may perhaps be doubted whether a decision that the tenant was a raiyat at fixed rates could, strictly speaking, be said to be a settlement of a rent or a decision of a dispute under section 105, such as should be incorporated in the record under section 107 (2) of the Act. But there can be no doubt that decisions of this kind do virtually affect the record, and are as a matter of practice incorporated in it. And it has been the practice of this Court for a long time, even before the last amendment of the Act, to regard points of this nature as capable of determination in proceedings under section 105 and as justifying second appeals in such proceedings. I think, therefore, that a decision by a Revenue Officer in a proceeding under section 105 that a tenant is a raiyat at fixed rates may reasonably be regarded as a matter that should have been incorporated in the record under section 107 (2) of the Act as amended in 1898; and that, therefore, while such proceedings were pending, the record might well have been regarded as incomplete under section 115, and the tenant is entitled to plead the benefit of section 50.

Appeals dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Chitty and Mr. Justice Carnduff.

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CHAIRMAN OF CHITTAGONG MUNICIPALITY

v.

JOGESH CHANDRA RAI.*

Bengal Municipal Act (Beng. III of 1884) ss. 46, 112, 113, 114 and 351A—Appointment of a paid Assessor at a meeting of the Commissioners within six months from the date of a lost amendment at a previous meeting, effect of—Assessment by such an officer, confirmed by the Appeal Committee whether impeachable—Rule 33 of the Model Rules under s. 351A of the Act.

The question of appointing a paid assessor under s. 46 of the Bengal Municipal Act (Beng. III of 1884) was raised at a meeting of Municipal Commissioners, as an amendment to a substantive motion; the amendment was lost; but the same question was again raised as a substantive proposition within six months from the date of the first meeting; the proposal being carried, an assessor was appointed who revised the assessment of the plaintiff. The plaintiff applied for a review under s. 113, but the assessment was confirmed under s. 114 of the Act:—

Held, that the appointment of the paid assessor was not *ultra vires*, inasmuch as the subject of the appointment of an assessor had not been finally disposed of at the first meeting, and therefore its reconsideration was permissible; and that, whether the assessor was or was not legally qualified to make any assessment, the validity of such an assessment when once confirmed by the Appeal Committee under s. 114 of the Act, could not be impeached.

SECOND appeal by the defendant, the Chairman of the Chittagong Municipality.

This appeal arose out of an action brought by the plaintiff against the Chairman of the Chittagong Municipality to have the valuation and assessment made of his holding, declared void. The allegation of the plaintiff was that at a meeting held on the 6th May 1903, the question of revising the assessment by a paid assessor, which was raised as an amendment to a substantive motion, was rejected by the Commissioners; that on the 29th July 1903, the Commissioners voted for a

* Appeal from Appellate Decree, No. 931 of 1907, against the decree of B. K. Mallik, District Judge of Chittagong, dated March 28, 1907, affirming the decree of Pramatha Nath Chatterjee, Offg. Subordinate Judge of Chittagong, dated March 31, 1906.

paid officer, and in consequence thereof an assessor was appointed who made assessment of the plaintiff's holding ; that under the Model Rules framed under section 351A of the Bengal Municipal Act the appointment of the paid assessor was illegal and as such the assessment made by him was without jurisdiction.

The defendant pleaded, *inter alia*, that the Civil Court had no jurisdiction to try the suit ; that the appointment of the paid assessor was not illegal ; and that the assessment made by him was not without jurisdiction.

It appeared that the appointment of the paid assessor was made at a meeting held without a requisition by two-thirds or more of the Commissioners as required by the Model Rule No. 33 framed under section 351A of the Municipal Act. It further appeared that the plaintiff preferred an appeal against the assessment to the Appeal Committee which confirmed it under section 114 of the Bengal Municipal Act.

The Court of first instance having held that the appointment of the paid assessor was *ultra vires*, decreed the plaintiff's suit. On appeal to the District Judge of Chittagong, the decision of the first Court was affirmed. Against the said decision the defendant appealed to the High Court.

Babu Ram Charan Mitter (with him *Moulvi Serajul Islam*), for the appellant. The Court below was wrong in holding that the appointment of the paid assessor was without jurisdiction. The question of the appointment was not finally disposed of at the previous meeting, and that, therefore, the appointment at the subsequent meeting held, although within six months, was perfectly legal. The same view was taken in second appeal No. 2499 of 1906 by Mr. Justice Stephen and Mr. Justice Holmwood. The plaintiff could not question the assessment, inasmuch as it was upheld by the Appeal Committee. A decision of the Appeal Committee is final under section 114 of the Bengal Municipal Act.

Dr. Rashbehary Ghose (with him *Babu Dharendra Lal Khastagir*), for the respondent. In the unreported decision

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referred to by the appellant, the learned Judges were not correct in saying that the matter of the appointment of the paid assessor was not finally disposed of at the previous meeting. I submit it was. That appeal was heard *ex parte* and the learned Judges fell into an error of fact when they said that the question of appointing was not finally disposed of. Section 46 of the Bengal Municipal Act gives power to the Commissioners to appoint certain officers and servants, but the question how that power is to be exercised is laid down in the Rules. That power is to be exercised at a meeting. Then Model Rule 37 comes in. Section 46 has nothing whatever to do with the procedure which is to be followed in the meeting. The subsequent meeting in which the paid assessor was appointed, was held within six months from the previous meeting, and that the said meeting was not convened at the requisition of at least two-thirds of the Commissioners. That being so, under the Model Rules the meeting was not properly convened and so the appointment of the paid assessor was *ultra vires*. The appointment being *ultra vires*, the action of the paid assessor was also *ultra vires*. The Chairman ought to have exercised his own judgment. I had a right to the benefit of it. If the party aggrieved went to the Commissioners under section 113 of the Act and the Commissioners refused to interfere, that would not validate the assessment.

Babu Ram Charan Mitter, in reply.

Cur. adv. vult.

CHITTY AND CARNDUFF JJ. This appeal arises out of a suit brought by a rate-payer against the Chairman of the Chittagong Municipality to have the assessment of his holding, whereby higher rates were imposed upon it, declared void on the ground that it was made by an assessor appointed in contravention of law.

It appears that at a meeting of the Municipal Commissioners of Chittagong held on the 6th May, 1903, the question of appointing a paid assessor under section 46 of the Bengal Municipal Act, 1884 (Bengal Act III of 1884, as amended by

Bengal Acts III of 1886, IV of 1894 and II of 1896), was raised by one of the Commissioners as an amendment to a substantive motion and that the amendment in favour of such an appointment was put to the meeting and lost. On the 29th July following, however, the question was again raised as a substantive proposition, and on this occasion the proposal was carried. The paid assessor, who revised the plaintiff's assessment in the manner complained of, was appointed accordingly : the assessment was presumably published under section 112 of the Act ; the plaintiff applied for a review under section 113 ; and the assessment was confirmed by the " Appeal Committee " of the Commissioners under section 114. The appointment of the paid assessor is attacked as *ultra vires* because, by Rule 33 of the Model Rules under section 351A of the Act framed by the Local Government and adopted by the Municipal Commissioners of Chittagong by resolution passed at a special meeting held on the 26th March 1895, " no subject once finally disposed of can be reconsidered within six months, unless not less than two-thirds of the Commissioners consent by signing a requisition." In this instance it is not suggested that any such requisition was made. The contention prevailed in both the Courts below, and the Chairman has now appealed to this Court.

Precisely the same point in connection with a similar assessment by the same paid assessor came before a Division Bench of this Court in the special appeal, No. 2499 of 1906, of the *Chairman of the Chittagong Municipality v. Kamalanath Nath Sen and Others* (1) decided on the 1st April 1908, Stephen and Holmwood JJ. then held that the subject of the appointment of a paid assessor had not been " finally disposed of " on the 6th May 1903 ; that, therefore, its reconsideration on the 29th July was permissible ; and that, whether the paid assessor was or was not legally qualified in making the assessment, the validity of the determination of the Commissioners under section 114 of the Act could not be impeached, and the case of the rate-payers must fail.

(1) (1908) Unreported,

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We have arrived at the same conclusion. Dr. Ghose, who has appeared for the respondent, argues that the loss of the amendment for the appointment of a paid assessor involved the confirmation of the existing method of assessment, under which (as Dr. Ghose tells us) the matter of assessment lay in the first instance in the hands of the Chairman. The respondent was, therefore, entitled to the benefit of the Chairman's judgment, and, on the analogy of a suitor whose case is adjudicated upon by the wrong Court, he has a right to complain of having been unlawfully deprived of that benefit. Dr. Ghose further argues that, if the assessment was void *ab initio*, its confirmation, as it were, by the Commissioners under section 114 of the Act could not validate it. We cannot yield to these arguments. It seems to us that there is no analogy between this case and that of a Court adjudicating without jurisdiction. We find, too, that—apart from section 111A, with which we are not here concerned—the Act provides only incidentally for the appointment of a paid assessor and makes no provision whatever as to the method or means of assessment. It is, we think, wholly immaterial what machinery is used for arriving at the valuation; all that is required is that there should be an assessment ready for publication and open to review under sections 112 to 114. The view taken by both the the Courts below was, therefore, in our opinion, wrong, and we allow the appeal and direct that the respondent's suit be dismissed. The respondent will bear the costs throughout.

Appeal allowed.

SJ C. G.

CRIMINAL REVISION.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Carnduff.*

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Criminal proceedings, legal institution of—Police report not disclosing nature of information—First information report omitting to state the information received—Information given by police officer to himself—Criminal Procedure Code (Act V of 1898) ss. 154, 173, 190 (1) (b).

A prosecution is not legally instituted under s. 190 (1) (b) of the Criminal Procedure Code when the police report under s. 173 does not set forth the nature of the information, and the first information report under s. 154 is equally defective in this respect.

THE petitioner, E. O. Lee, was a Permanent-way Inspector of the East Indian Railway in charge of the Section between Sainthia and Azimgunge stations. On the 14th June 1908 he was engaged in certain repairs to a bridge between Sainthia and Mollarpur after having, it was alleged, delivered caution messages to the Station Masters of these stations advising them of the fact, and placed danger signals and detonators on the line at three-fourth mile on either side of the bridge. After the work on the bridge had commenced, a down goods train from Mollarpur was sighted coming along without relaxing speed, whereupon the petitioner, as was stated by him in his petition, tried to stop it, but the train passed on to the bridge and partly fell into the river through a gap, and some men were injured. The petitioner alleged that he gave information of the occurrence to the Sub-Inspector, H. L. Adhikary, and brought him on his trolley to the scene of the accident, when the latter held an enquiry and recorded the statements of several witnesses who supported his story. On the following day an enquiry was made by the

* Criminal Revision No. 1202 of 1909, against the order of H. A. Lane, Deputy Magistrate of Suri, dated Sept. 21, 1909.

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Railway authorities, and on the 16th and 21st November further police investigations were held by the Assistant Inspector-General of Police and an Inspector of Police respectively. The petitioner was suspended on the 28th instant.

On the 6th July H. L. Adhikary recorded a first information report under section 154 of the Criminal Procedure Code, the material portion of which was as follows :—

<i>Name and residence of informant or complainant.</i>	<i>Name and address of accused.</i>	<i>Brief description of offence, etc.</i>	<i>Steps taken regarding investigation, etc.</i>
H. L. Adhikary, S.I., Govt. R.P., Sainthia.	E.O. Lee, P.W. I., Rampurhat.	Section 101, Act IX of 1890. Neglecting to put danger signals and fog signals on the line before opening the rail at the bridge.	On receipt of P. W. L. D. E. No. 559G of 24th June 1909, with Assistant Inspector-General's order of date, I instituted the case. (Sd.) H. L. ADHIKARY, Sub-Inspector.

(First Information to be recorded below.)

According to the order of the Assistant Inspector-General of date I instituted the case.

6th July 1908.

(Sd.) H. L. ADHIKARY,
Sub-Inspector.

The petitioner was arrested on the 12th July at Calcutta by H. L. Adhikary and released on bail. On the 14th a police report under section 173, termed a charge sheet, was sent in by the Sub-Inspector, stating merely the name and address of the informant, the section of the law, the names and addresses of the witnesses and the fact of the taking of bail. On the 21st September the petitioner appeared before the Deputy Magistrate of Suri, to whom the case was transferred by the District Magistrate, and submitted that the proceedings against him had not been legally instituted; and obtained time to move the High Court.

Mr. K. N. Chaudhuri (with him Babu Manmatha Nath Mukerjee), for the petitioner. There was no compliance with

the provisions of sections 154 and 173 of the Code. The former contemplates an information by a person other than the recording officer, and requires the information to be stated. The Sub-Inspector held no investigation *suo motu*, but submitted a report under section 173 which did not set out the nature of the information received. It was of vital importance in this case that this should have been done. No cognizance can be taken by a Magistrate on such a police report under such circumstances.

No one appeared for the Crown.

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JENKINS C.J. AND CARNDUFF J. In this case a Rule has been issued calling upon the District Magistrate to show cause why the proceeding against the petitioner should not be quashed on the ground that the prosecution has not been legally instituted, or, in the alternative, why the case should not be transferred to some competent Magistrate in Alipore or some other district.

The grounds on which it is said that the prosecution has not been legally instituted are briefly these. Section 190 of the Criminal Procedure Code describes the conditions requisite for the initiation of proceedings, and it is thereby provided that the Magistrate "may take cognizance of any offence (a) upon receiving a complaint of facts which constitute such an offence; (b) upon a police report of such facts; (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed." We are told by the applicant that in this case it is suggested on the part of the prosecution that cognizance has been taken under clause (b), that is, upon a police report of such facts. Now, section 173 indicates what that police report should set forth, and provides that a police report should set forth, among other things, the nature of the information. It is pointed out that in the circumstances of this case it is of paramount importance that at this initial stage it should appear what the nature of the information is. The petition sets forth the case of the present applicant in

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considerable detail indicating precisely what he did, and the precautions that he took. If this version be accepted as true, it is difficult to see how any case can succeed against him. Not only has the applicant set out his case in the way I have described, but no cause has been shown against the present application, nor have his allegations been questioned in any manner. Now, as a matter of fact, the police report which has been shown to us in this case does not set forth the nature of the information, it is absolutely silent on that point; and it would seem that the form ordinarily adopted in these cases is equally defective. In the circumstances, we set aside the proceedings. If it is intended to proceed against the present applicant, then the procedure of the Code as indicated in section 190 and also in section 173, if it be requisite to rely on that section, must be followed.

Rule absolute.

E. H. M.

CRIMINAL REVISION.

1909
Sept. 30.

Before Mr. Justice Chatterjee and Mr. Justice Ryves.

ABDULLAH KHAN

v.

EMPEROR.*

"Judicial proceeding"—Preliminary inquiry by an Assistant Settlement Officer to determine whether a prosecution should be directed—Power to take evidence on oath in such inquiry—False evidence in the course of the inquiry—Criminal Procedure Code (Act V of 1898) ss. 4 (m) and 476—Indian Penal Code (Act XLV of 1860) s. 193 and Explanation (2)—Oaths' Act (X of 1873) s. 4—Government Rules under the Bengal Tenancy Act (VIII of 1885), Rule 40.

A Court holding a preliminary inquiry under s. 476 of the Criminal Procedure Code may legally take evidence on oath therein, and the inquiry is, therefore, a "judicial proceeding" within the terms of s. 4 (m) of the Code.

Raghoobans Sahoy v. Kokil Singh (1) and *Emperor v. Gopal Barik* (2) referred to.

* Criminal Revision No. 1004 of 1909, against the order of C. W. E. Pittar, Sessions Judge of Patna, dated Aug. 9, 1909.

(1) (1890) I. L. R. 17 Calc. 872, 875. (2) (1906) I. L. R. 34 Calc. 42, 46.

Such an inquiry is also a stage of a judicial proceeding under Explanation 2 to s. 193 of the Penal Code, and a person giving false evidence in the course of it commits an offence under the section.

Under s. 4 of the Oaths' Act and Rule 40 (a) of the Government Rules framed under the Bengal Tenancy Act, a Settlement Officer has the power to receive evidence on oath, and is competent to hold a preliminary inquiry under s. 476 of the Criminal Procedure Code.

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IN the course of certain attestation proceedings under the Bengal Tenancy Act in Mouza Muzahidpore, of which Kazi Syed Afzal was a proprietor, one Sauki Roy, one of the tenants, filed some rent receipts purporting to be signed by the petitioner, Abdullah Khan, as *patwari* of the said Kazi Syed. The Assistant Settlement Officer, before whom the proceedings were pending, suspected the documents to be forged and held a preliminary inquiry under section 476 of the Criminal Procedure Code, on the 13th April 1909, against Sauki, and in the course of it the petitioner was examined on oath as a witness, and deposed that he had ceased to be *patwari* of Muzahidpore for the last six years. This statement being inconsistent with a previous one made by him in a rent suit on the 28th November 1905, the Assistant Settlement Officer thereupon drew up a proceeding against him, on the same day, under section 476 of the Criminal Procedure Code, and directed his prosecution for giving false evidence. The petitioner was tried and convicted by Babu J. C. Sen, Sub-divisional Officer of Barh, on the 5th July, under section 193 of the Penal Code, and sentenced to rigorous imprisonment for one month and a fine of Rs. 25 in default. An appeal against the said order was dismissed by the Sessions Judge of Patna on the 9th August, and the petitioner then moved the High Court and obtained a Rule to set aside the conviction and sentence on the ground that a proceeding under section 476 of the Criminal Procedure Code is not a "judicial proceeding."

Mr. Huq (with him *S. A. Kareem*), for the petitioner. A proceeding under section 476 is not a "judicial proceeding" and the conviction is bad. A Court is not bound to hold any preliminary inquiry at all before directing a prosecution.

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Refers to *Baperam Surma v. Gouri Nath Dutt* (1) and to the wording of section 471 of the Code of 1872.

Mr. Orr (Deputy Legal Remembrancer), for the Crown. Under Rule 40 (a) of the Government Rules, the Assistant Settlement Officer is vested with all the powers exercisable by a Civil Court in the trial of suits. He can, therefore, take evidence, and under section 4 (a) of the Oaths' Act he can do so on oath. He is a "Court" within section 476 of the Criminal Procedure Code. The next question is whether the "preliminary inquiry" therein referred to is a "judicial proceeding": see the definition of the term in section 4 (m) of the Code. A Court is empowered under section 476 (1) to make "any inquiry that may be necessary." One mode of making it is certainly to take evidence: *Raghoobuns Sahoy v. Kokil Singh* (2) approved of in *Queen-Empress v. Munda Shetti* (3). Before a Court can direct a prosecution under section 476 there must be direct evidence of an offence taken in the preliminary enquiry if there is no such evidence in the original case: *Khepu Nath Sikdar v. Grish Chunder Mukerji* (4). See also *Shashi Kumar Dey v. Shashi Kumar Dey* (5). It has been held in *Emperor v. Gopal Barik* (6) that a proceeding under section 476 is a "judicial proceeding." A Court has power under section 195 to hold an inquiry and take evidence: *Queen-Empress v. Motha* (7); *Shashi Kumar Dey v. Shashi Kumar Dey* (5). It must have the same power under section 476 (1) to enable it to determine whether there are "sufficient grounds" for proceeding thereunder.

CHATTERJEE J. In this case the petitioner has been convicted under section 193 of the Indian Penal Code for giving false evidence in the course of a judicial proceeding. The nature of that judicial proceeding was as follows. The Assistant Settlement Officer made an inquiry under section 476 of

(1) (1892) I. L. R. 20 Calc. 474.

(4) (1889) I. L. R. 16 Calc. 730.

(2) 1890) I. L. R. 17 Calc. 872, 875.

(5) (1892) I. L. R. 19 Calc. 345.

(3) (1900) I. L. R. 24 Mad. 121.

(6) (1906) I. L. R. 34 Calc. 42, 46.

(7) (1897) I. L. R. 20 Mad. 339.

the Criminal Procedure Code as to whether he should or should not order the prosecution of certain persons for filing false receipts in the course of a settlement proceeding before him. The petitioner is said to have given false evidence in that inquiry. The petitioner obtained a Rule on the District Magistrate to show cause why the sentence passed upon him should not be set aside on the ground that the proceeding under section 476 of the Criminal Procedure Code was not a judicial proceeding. "Judicial proceeding" has been defined in section 4 of the Criminal Procedure Code, and it includes any proceeding in the course of which evidence is or may legally be taken on oath. Now, in order to see in what proceeding evidence can be taken on oath, we must refer to the Oaths' Act. Section 4 of Act X of 1873 lays down that all Courts and persons having by law or consent of parties authority to receive evidence are entitled to administer oaths. The next thing to consider is whether the Assistant Settlement Officer was such a person. Under Rule 40 of the Government Rules published under the Bengal Tenancy Act the Assistant Settlement Officer has all the powers exercisable by a Civil Court in the trial of suits. Receiving evidence is certainly within such power and, therefore, the Assistant Settlement Officer was authorised to receive evidence; and if he was authorised to receive evidence then comes the question whether, although authorised to receive evidence on oath, he could receive evidence on oath in a proceeding under section 476 of the Criminal Procedure Code. Now, section 476 says that when any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence brought under its notice in the course of a judicial proceeding, such Court after making any preliminary inquiry that may be necessary may send the case for inquiry or trial. The Assistant Settlement Officer, therefore, was entitled to make the preliminary inquiry that he made in this case.

The next question that arises is whether he had authority to administer oath in such a proceeding or to receive evidence in such a proceeding. Inquiry must be upon evidence. It

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has been held in the case of *Raghoobuns Sahoy v. Kokil Singh* (1), that one mode of making an inquiry is certainly to take evidence, and, therefore, if the Settlement Officer was authorised to make an inquiry he was authorised to take evidence. If he was authorised to take evidence, then the whole question is answered, because then it is a judicial proceeding and the petitioner has been rightly convicted.

The question, however, can be looked at in another way also. Under section 193 of the Indian Penal Code, Explanation (2), an investigation directed by law preliminary to a proceeding before a Court of Justice is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice. This preliminary investigation, there can be no doubt upon the wording of section 476, is an investigation or inquiry directed by law, although the Magistrate is given a certain amount of discretion with regard to the same; and, therefore, reading by the light of this Explanation also it would seem that the preliminary inquiry before the Assistant Settlement Officer was a stage of a judicial proceeding. In that view also the conviction would be right. It has been held in the case of *Emperor v. Gopal Barik* (2) that a proceeding under section 476 is a judicial proceeding. Although that case was dealing with the question of such a proceeding being a judicial proceeding within the meaning of section 439 of the Criminal Procedure Code, still we think that the proceeding, if it is a judicial proceeding for one purpose, is also a judicial proceeding for another purpose, and such being the case we think that the conviction in this case is correct. The sentence, however, is reduced to the eleven days already served by the petitioner, and he will be discharged.

RYVES J. I agree generally.

Sentence modified.

E. H. M.

(1) (1890) I. L. R. 17 Calc. 872. (2) (1906) I. L. R. 34 Calc. 42, 46.

APPELLATE CIVIL.

Before Mr. Justice Holmwood and Mr. Justice Chatterjee.

RANJIT SINGH

v.

KALIDASI DEBI.*

1909

Nov. 25.

Chowkidari chakran lands—Bengal Act VI of 1870, s. 50—Resumption and transfer by Government—Rights of patnidars and dar-patnidars—Suit for recovery of khas possession—Frame of suit—Specific performance of contract—Landlord and tenant.

Where chowkidari chakran lands had been resumed by the Government and settled under s. 50 of Bengal Act VI of 1870, with a zemindar who had created a patni under which there was a darpatni and who made a raiyati settlement, and the dar-patnidars brought a suit against the zemindar for khas possession of the lands and for the execution of a deed of transfer, on the allegation that the zemindar had transferred his rights in the said lands to the patnidars and the patnidars had similarly transferred all their rights, subject of course to the payment of the respective head rents:—

Held, that the joining of the two prayers for execution of a deed of transfer and for recovery of possession was in no way repugnant to any rule of law.

Nathu Pandu v. Budhu Bhika (1) and *Narayana Kavirayan v. Kandasmī Goundan* (2) referred to.

SECOND APPEAL by the defendant No. 1, Rajah Ranjit Singh Bahadur.

A suit was instituted by the plaintiff, Kalidasi Debi, who was a dar-patnidar, for execution of a deed of transfer and for the recovery of khas possession of the resumed chowkidari chakran lands from the defendant, Rajah Ranjit Singh Bahadur, on the allegation that by virtue of the patni lease the right to these lands passed to the patnidars, Raja Miah and Jabeda Bibi defendants Nos. 2 and 3 respectively, and that the patnidar defendants had conveyed the same to her. Defendant No. 1 resisted the claim on the ground that the chakran lands, which were resumed by the Government under Bengal Act VI of

* Appeals from Appellate Decrees, Nos. 1092 of 1907 and 1093, 1094, 1199 and 1200 of 1907, against the decrees of K. N. Roy, District Judge of Birbhum, dated May 20, 1907, confirming the decree of Umesh Chandra Sen, Subordinate Judge of Birbhum, dated July 19, 1906.

(1) (1893) I. L. R. 18 Bom. 537.

(2) (1898) I. L. R. 22 Mad. 24.

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1870, were subsequently settled with him under section 50 of the said Act, on different dates in 1898, 1899 and 1900 at a total jama of Rs. 215, and that he made a settlement of the same lands with defendants Nos. 4 to 18, who were now in possession, and that the plaintiff had no cause of action, and that the suit was barred by limitation.

The Subordinate Judge decreed the suit for the recovery of possession with mesne profits, but left to a future suit the determination of the terms on which the plaintiff was to hold the lands.

The decree of the Subordinate Judge was upheld on appeal by the District Judge. Against this decision the defendant No. 1 appealed to the High Court.

Dr. Rashbehary Ghosh (with him *Babu Basanta Kumar Bose*, *Babu Satish Chandra Ghose*, *Babu Priya Sankar Mazumdar*, *Babu Hemendra Nath Sen* and *Babu Sridhar Das Gupta*), for the appellants. The suit has been wrongly framed and the jural relation created by the patni and dar-patni leases in respect of the disputed lands, is no more than a mere agreement to grant, contingent upon a subsequent transfer, and a suit for specific performance of the contract ought to have been first brought before the suit for recovery of possession : *Ranjit Singh v. Radha Charan Chandra* (1) and *Kashim Sheik v. Prasanna Kumar Mukerjee* (2). The former case has been dissented from in *Banwari Mukunda Deb v. Bidhu Sundar Thakur* (3) and the latter distinguished by the case of *Kazi Newaz Khoda v. Ram Jadu Dey* (4), and there should, therefore, be a reference to a Full Bench.

Babu Dwarka Nath Chakravarti (with him *Babu Jogendra Nath Mukerjee* (in No. 1092), *Babu Ram Chandra Mozumdar* and *Babu Tarak Chandra Chakravarti* (in Nos. 1074, 1199, 1200), for the respondent. The plaint contains a prayer for specific relief by way of execution of a proper deed of settlement and a further prayer for consequential relief by way of possession, hence even if the case of *Ranjit Singh v. Radha Charan*

(1) (1907) I. L. R. 34 Calc. 564.

(2) (1906) I. L. R. 33 Calc. 596.

(3) (1908) I. L. R. 35 Calc. 346.

(4) (1906) I. L. R. 34 Calc. 109.

Chandra (1) is relied upon, the suit is not defective and no reference to a Full Bench is necessary.

Cur. adv. vult.

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HOLMWOOD AND CHATTERJEE JJ. The defendant No. 1 is the zemindar of a certain mouza called Kaytha now in the district of Birbhum. Defendants Nos. 2 and 3 are the patnidars, and plaintiff is the dar-patnidar of the said mouza. Subsequently to the creation of these tenures the Government resumed the chowkidari chakran lands of the mouza under Bengal Act VI of 1870, and made a transfer of the same to defendant No. 1 under section 50 of the said Act on several dates in 1898, 1899 and 1900 at a total jama of 215 rupees, and defendant No. 1 made raiyati settlements of the said lands with defendants Nos. 4 to 18 who are in possession. The plaintiff brings this suit on the allegation that the defendant No. 1 having transferred all his rights in respect of the mouza to the patnidars, and the patnidars having similarly transferred all their rights to the dar-patnidar, subject of course to the payment of the respective head rents, she as dar-patnidar was entitled to khas possession of the said lands at the jama payable to the Collector. She prays that she may recover khas possession and that proper deeds of transfer may be executed in her favour by defendant No. 1. The Subordinate Judge gave a decree for recovery of possession with mesne profits from date of decree, but left to a future suit the determination of the terms on which the plaintiff was to hold the lands. On appeal, the District Judge of Birbhum has upheld the decree of the Subordinate Judge, and in second appeal it is contended on behalf of defendant No. 1—(i) that the suit has been wrongly framed; it ought to have been one for the specific performance of a contract pure and simple without any prayer for possession, and that it should be dismissed on this ground alone; and (ii) that the suit is barred by limitation.

In support of the first plea the learned vakil for the appellant contends that defendant No. 1 had no title in the disputed

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lands before the transfer by the Collector, and he could not therefore have made any valid transfer of the same at the time of the patni, nor on the same ground could the patnidar transfer any title to the dar-patnidar ; that the jural relation created by the patni and the dar-patni leases in respect of the disputed land was no more than that of a mere agreement to grant, contingent upon a subsequent transfer, and this agreement must be specifically enforced before the plaintiff could have a title which would entitle her to treat defendant No. 1 or his lessees as trespassers and to sue for recovery of possession. He relies upon two cases as supporting his contention : *Ranjit Singh v. Radha Charan Chandra* (1) and *Kashim Sheik v. Prasanna Kumar Mukerjee* (2). It is conceded that the former case has been dissented from in a later case, that of *Banwari Mukunda Deb v. Bidhu Sundar Thakur* (3), and the latter case distinguished by one Judge and dissented from by another in the case of *Kazi Newaz Khoda v. Ram Jadu Dey* (4), and it is contended that a reference ought to be made to a Full Bench in consequence of this conflict. The second ground depends upon the decision of the first. The learned vakil for the respondent contends that the suit is rightly conceived, in that it does contain a prayer for specific relief by way of execution of a proper deed of settlement and contains a further prayer for consequential relief by way of possession, so that even if the right view of the law were that enunciated in the case of *Ranjit Singh v. Radha Charan Chandra* (1), there is no defect in the form of the suit and no reference to a Full Bench is necessary: he also contends that if that view is not right still his suit is well conceived, in that he prays for recovery of possession as his main relief and the other reliefs as ancillary thereto.

We have carefully considered the plaint and we have no doubt it is rightly conceived in either view of the law : we do not think that the joining of the two prayers for execution of a deed of transfer and for recovery of possession is in any way repugnant to any rule of law. In the case of *Nathu valad*

(1) (1907) I. L. R. 34 Calc. 564.

(3) (1908) I. L. R. 35 Calc. 346.

(2) (1906) I. L. R. 33 Calc. 596.

(4) (1906) I. L. R. 34 Calc. 109.

Pandu v. Budhu valad Bhika (1), Sir Charles Sargent C.J. held that a claim to possession on the contract might be barred by section 43 of the Civil Procedure Code, as not included in a previous suit for specific performance, but a suit for possession based on the deed of sale executed as a result of the suit for specific performance was a different cause of action and was not so barred. The Madras High Court in the case of *Narayana Kavirayan v. Kandasami Goundan* (2), held that a separate suit for possession would be barred as the right to possession arose at the same time as the right to the conveyance. Although Sir Charles Sargent in the Bombay case held that the conveyance gave a fresh cause of action for a suit for possession, he also held that there was a claim to possession on the contract which was barred by section 43 of the Civil Procedure Code, so that there is no conflict between the said two cases as to there being a cause of action for possession on the contract, which ought to be impleaded in the suit for specific performance. In this view of the cases, it is not necessary in this case to consider whether there is a fresh cause of action on the conveyance and a fresh suit for recovery of possession would be maintainable. It is sufficient to say that in this case the prayers are rightly joined and both the above cases support this view.

The suit therefore is not liable to be dismissed on the ground that there is no cause of action for recovery of possession.

It is contended, however, that had the parties gone to trial on the issue of specific performance the defendant No. 1 would have been in a position to prove by evidence that he had given notice of refusal long before. The question of limitation in a suit for specific performance was not considered in the Court of first instance, but it is clear from the judgment of the lower Appellate Court that the plaintiff did put in documentary evidence to show that the demand and refusal were within time, and there appears to have been no reason why the defendant No. 1 should not have put in rebutting evidence showing a previous refusal if there was one. The necessity for bringing

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(1) (1893) I. L. R. 18 Bom. 537.

(2) (1898) I. L. R. 22 Mad. 24.

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a suit for specific performance as a condition precedent to any relief was never pressed until the case was being argued before us and we do not think that any such question arose in the lower Courts or that the lower Appellate Court committed any error of law in deciding as it did on the materials before it. The question of limitation and the question of privity of contract were decided on the facts by the lower Appellate Court, and the appellant now wishes to have a remand to make a new case on the facts as regards limitation to a suit for specific performance, because it is possible that if a Full Bench decided that such a suit was imperative such a defence might have been open to him in the Court of first instance. This we cannot allow. Another contention upon which it is sought to obtain a reference to a Full Bench in this case is that if a suit for specific performance is imperative, and if this is regarded as such a suit the conditions on which the transfer is to be made must be decided in the suit itself. It does not appear to us that this question was raised in any form in the lower Appellate Court, but it is admitted by the learned pleader for the respondent that the conditions on which the transfer should be made are laid down in *Hari Narain Mozumdar v. Mukund Lal Mundal* (1) as a matter of law, and we are of opinion that the learned Judge in the Court below should in any case, whatever view of the law be taken, decide the conditions in this suit on the principles laid down in that decision. We think that all that is necessary is to remand the case to him now for that purpose upholding the judgments and decrees in other respects and dismissing the appeals.

It is admitted that the same result will follow the analogous appeals Nos. 1093, 1094, 1199, 1200.

We allow no costs in these appeals but the appellants must pay the costs in the lower Courts.

Appeals dismissed.

S. A. A. A.

(1) (1900) 4 C. W. N. 814.

LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Mookerjee.

JADUNATH CHOWDHRY

v.

KAILAS CHANDRA BHATTACHARJEE.*

1909

June 1.

Arbitration—Private reference—Award—Reference by some of the disputing parties, effect of—Civil Procedure Code (Act XIV of 1882) s. 506.

Upon a suit brought by the plaintiffs for recovery of possession of certain lands, the defence raised was that the plaintiffs were bound by an award which was made upon a private reference to arbitration, to which some of the plaintiffs and the defendants were parties:—

Held, that the award was binding as between those plaintiffs and the defendants who were parties to the reference.

APPEAL under section 15 of the Letters Patent by the defendant, Jadu Nath Chowdhry, from a judgment of Brett J.

The plaintiffs brought a suit out of which the present appeal arose, for the recovery of possession of certain immovable properties on the establishment of their title thereto. It appeared that the dispute between the three plaintiffs and the defendants arose some years before the institution of the present suit, with the result that there were criminal proceedings between the parties. Afterwards plaintiffs Nos. 1 and 3 agreed with the defendants to refer the matter in dispute to arbitration. The arbitrator by an award found that the land in dispute was included in the properties of defendant No. 1. The plaintiffs thereupon brought the present suit. Defendant No. 1 pleaded, *inter alia*, that the suit was barred by limitation, and that the award was binding between the parties to the reference to the arbitrator.

The Court of first instance having held that the plaintiffs had proved their title to the disputed land, decreed the suit.

* Letters Patent Appeal No. 27 of 1908, in appeal from Appellate Decree, No. 1246 of 1906.

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It declined to act upon the award as it found that it was not proved. On appeal, the lower Appellate Court held that as the reference to arbitration was a reference made by two only of the plaintiffs, it was an invalid reference, and that the award could have no legal effect. But having agreed with the Court of first instance that the plaintiffs had proved their title, it dismissed the appeal.

The plaintiffs preferred a second appeal to the High Court, which was heard by Mr. Justice Brett sitting alone, the subject matter of the suit being less than Rs. 100 in value. His Lordship agreeing with the decision of the lower Appellate Court, dismissed the appeal.

The plaintiffs then preferred this appeal under section 15 of the Letters Patent.

Babu Samatul Chandra Dutt (with him *Babu Satis Chandra Mukherjee*), for the appellant. The parties to the reference are bound by the award of the arbitrator, although the award was made upon a private reference: *Bhajahari Saha Banikya v. Behary Lal Basak* (1), *Muhammed Nawaz Khan v. Alam Khan* (2), *Rani Bhagoti v. Rani Chandan* (3) and *Hira Singh v. Gunga Sahai* (4). Though an award, which has not been made on a reference by all the parties, cannot be converted into a final decree in the manner laid down in Chapter XXXVII of the Civil Procedure Code (Act XIV of 1882), so as to prevent an appeal, it is not null and void but is evidence against the parties concerned.

Babu Baidya Nath Dutt, for the respondents. An award to be valid and binding, all the parties to the suit who are interested must concur in making the reference: see section 506, Civil Procedure Code. In the present case all the parties did not join, and therefore it is null and void. The only way in which a private award, such as the present, could be held to have effect would be by way of a conveyance.

(1) (1906) I. L. R. 33 Calc. 881.

(2) (1891) I. L. R. 18 Calc. 414 ;
 L. R. 18 I. A. 73.

(3) (1885) I. L. R. 11 Calc. 386 ;
 L. R. 12 I. A. 67.

(4) (1883) I. L. R. 6 All. 322 ;
 L. R. 11 I. A. 20.

But a conveyance could only be valid if properly stamped and registered. The award not being stamped and registered, it could have no legal and binding effect.

Babu Samatul Chandra Dutt, in reply. The property in dispute is valued at less than 100 rupees, therefore the award need not be registered. The question of want of stamp was raised for the first time in second appeal here, and that objection should not be allowed to be taken now.

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JENKINS C.J. The three plaintiffs in this case, who are respondents before us, have brought this suit for the establishment of their title to the lands in suit and also for recovery of possession. By way of answer to this suit, it was pleaded that it was barred by limitation, and that as against plaintiffs Nos. 1 and 3, an answer was furnished by an award made in a reference to which plaintiffs Nos. 1 and 3 and the defendants were parties. The plea of limitation did not succeed in either Court, nor has it been pressed on us in appeal. The plea on the award did not commend itself to either of the lower Courts or to the learned Judge before whom this case came in the first instance on second appeal. It appeared to the learned Judge, as also to the lower Appellate Court, that it was a fatal objection to the validity of this award that all the present plaintiffs were not parties to it, and an argument based on the supposed analogy of section 506 of the old Civil Procedure Code prevailed. We think that this argument cannot succeed seeing that the award was on a private reference, and we hold that it is binding as between plaintiffs Nos. 1 and 3 and defendant No. 1 with whom alone we are now concerned.

It is difficult to formulate any ground on which the award would not be good and valid as between those parties, and none has been suggested before us in argument. Then we have to consider whether there is any force in the suggestion that the award is ineffective, inasmuch as it was not stamped or registered. So far as the want of stamp is concerned, that is an objection that cannot be taken for the first time in second

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appeal, while so far as the want of registration is concerned, it is clear that the provisions of the Registration Act do not apply by reason of the value of the property. In this view, it becomes unnecessary to consider whether, apart from the fact that the property is less than Rs. 100 in value, the Registration Act would apply to this particular award. The result is, that the defendant's appeal must succeed as against plaintiffs Nos. 1 and 3. And, the decree we now pass is that, as against plaintiffs Nos. 1 and 3 the suit be dismissed; but as against plaintiff No. 2 it be remanded to the lower Court in order that it may be determined what precisely is the interest of plaintiff No. 2 in the property in question. To the extent of that interest, plaintiff No. 2 will be entitled to a decree against defendant No. 1.

This determination will in no way affect the decree as between the plaintiffs and the defendants who have not appealed.

The appellant will get his costs as against plaintiffs Nos. 1 and 3 throughout, and will pay to plaintiff No. 2 one-third of the plaintiffs' cost throughout, that is to say, one-third of the costs of all the plaintiffs throughout.

MOOKERJEE J. agreed.

Appeal allowed in part.

S. C. G.

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Chatterjee.

RAM KUMAR SHAHA

v.

RAM GOUR SHAHA.*

1909

June 8.

Sale in execution of decrees—Refund of purchase-money, suit for—Caveat emptor, doctrine of—Civil Procedure Code (Act XIV of 1882) ss. 313, 315.

Under s. 313 of the Civil Procedure Code (Act XIV of 1882), a purchaser can apply to have a sale set aside on the ground that the person whose property purported to be sold had no saleable interest therein. The doctrine of *caveat emptor* has not the same effect under the Code of Civil Procedure of 1882 as under the old Code (VIII of 1859).

Dorab Ally Khan v. Executors of Khajah Moheesooddeen (1) and *Sowdaminee Chowdhraïn v. Kishen Kishore Poddar* (2) distinguished.

Under s. 315 of the Civil Procedure Code (Act XIV of 1882), a suit lies to recover purchase-money paid at a Court-sale for property to which the judgment-debtor had no title or saleable interest.

Hari Doyal Singh Roy v. Sheikh Samsuddin (3) and *Nityanund Roy v. Juggat Chandra Guha* (4) followed.

SECOND APPEAL by the defendant, Ram Kumar Shaha Poddar.

The defendant, Ram Kumar Shaha, under a rent decree caused the sale of the *tuppa* right of one Buzlar Sobhan Chowdhury to be sold on the 8th December 1902, for Rs. 1,550, at an execution sale, and the same was purchased by the plaintiff and the purchase-money so paid was received by the defendant in satisfaction of his decree. After the said sale one Mrs. Albua J. Dillany brought a suit for a declaration that the said *jote* sold at the execution-sale did not belong to Buzlar Sobhan Chowdhury, but to herself, and obtained a decree.

* Appeal from Appellate Decree, No. 2091 of 1907, against the decree of Dandadhari Biswas, Subordinate Judge of Chittagong, dated June 12, 1907, confirming the decree of Hem Chandra Mukherjee, Munsif of Chittagong, dated July 14, 1906.

(1) (1878) L. L. R. 3 Calo. 806.

(3) (1900) 5 C. W. N. 240.

(2) (1869) 12 W. R. 3, F. B.

(4) (1902) 7 C. W. N. 105.

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The plaintiff, thereupon, brought the present action for the recovery of the purchase-money against the defendant, which was decreed by the Munsif. The defendant appealed to the Subordinate Judge who dismissed the appeal.

The defendant, thereupon, appealed to the High Court.

Babu Harendra Narain Mitter (with him *Babu Surendra Nath Ghosal*), for the appellant. The suit is not maintainable: *Dorab Ally Khan v. Executors of Khajah Moheooddeen* (1), *Sowdaminee Chowdhraïn v. Kishen Kishore Poddar* (2), and that the suit is barred by limitation: Article 69, 97 of Act XV of 1877: *Hanuman Kamat v. Hanuman Mandur* (3) and *Sundara Gopalan v. Venakatavarada Ayyangar* (4).

Babu Nilmadhab Bose and *Babu Dharendra Lal Kastgir*, for the respondent, relied upon sections 313 and 315 of the Code of Civil Procedure (XIV of 1882) and *Hari Doyal Singh Roy v. Sheik Samsuddin* (5) and *Nityanund Roy v. Juggat Chandra Guha* (6).

COXE AND CHATTERJEE JJ. The defendant, appellant in this suit, instituted a rent suit against one Buzlar Sobhan Chowdhury. He obtained a decree and in execution put up a certain jote to sale as being the property of Buzlar Sobhan. This property was purchased by the plaintiff. Subsequently a certain Mrs. Dillany brought a suit, in which she made the present plaintiff and the present defendant parties, for a declaration that this jote belonged, not to Buzlar Sobhan Chowdhury, but to herself, and in this suit she obtained a decree. The plaintiff then brought this suit for recovery of the money which he had paid for his purchase. The suit has been decreed and the defendant appeals.

The first point taken on behalf of the appellant is that the suit itself is not maintainable, and reliance is placed first on the decision in *Dorab Ally Khan v. Executors of Khajah Moheooddeen* (1). That decision, however, was passed under

(1) (1878) I. L. R. 3 Calc. 806.

(2) (1869) 12 W. R. 8, F. B.

(3) (1891) I. L. R. 19 Calc. 123.

(4) (1893) I. L. R. 17 Mad. 228.

(5) (1900) 5 C. W. N. 240.

(6) (1902) 7 C. W. N. 105.

the old Code of 1859 and proceeded principally on the doctrine of *caveat emptor*. It is impossible, however, to hold that that doctrine has the same effect under the Code of 1882 that it had under the former Code. Section 313 of the present Code enacts that a purchaser may apply to have the sale set aside on the ground that the person whose property purported to be sold had no saleable interest therein. No such provision is found in the former Code and the addition of this section clearly goes far to weaken the effect of the doctrine of *caveat emptor* in so far as it might be applicable to execution sales.

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Reliance has also been placed on the decision in *Soudaminee Chowdhraim v. Kishen Kishore Poddar* (1). In that case it was held that a purchaser can recover his purchase-money only when the sale is set aside summarily for irregularity or the like under the provisions of the Act, and not when a third party succeeds in establishing his title to the property sold. But this decision also was passed under Regulation VII of 1825, and in the Code of 1882 the law has been considerably changed. Section 315 lays down that when a sale of immoveable property is set aside under sections 310A, 312 or 313, or when it is found that the judgment-debtor had no saleable interest, then the purchaser is entitled to relief. The use of the disjunctive shows that it is only when the sale is set aside under section 313 that the purchaser is entitled to relief; and that being so, it is clear that the decision cited has not the same application under the Code of 1882 that it had under the Code of 1859.

Next, it is argued that section 315 was never intended by the Legislature to give to a purchaser deprived of the purchased property a right to sue, or any right to relief beyond an application to the execution Court under section 315. This point, however, has been decided against the appellant in *Hari Doyal Singh Roy v. Sheikh Samsuddin* (2) and *Nityanrond Roy v. Juggat Chandra Guha* (3). The learned pleader for the appellant relies on the decision in *Sundara Gopalan v. Venkata Varada Ayyangar* (4). But that decision, though entitled to the greatest

(1) (1869) 12 W. R. 8, F. B.

(2) (1900) 5 C. W. N. 240.

(3) (1902) 7 C. W. N. 105.

(4) (1893) I. L. R. 17 Mad. 228.

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respect, is not of such authority as to bind us to differ from the decisions of this Court. The first point taken for the appellant, therefore, in our opinion, fails.

The next point taken is that the Subordinate Judge is wrong in his finding that the plaintiff had no notice of Buzlar's want of title. The learned Subordinate Judge says :—" The evidence as adduced by defendant's witness No. 2 that the plaintiff knew prior to his purchase to the effect that the judgment-debtor had no right in the property, is of a suspicious character. No reliance can be placed on this witness's statement." He then gives his reasons for disbelieving this witness, and we have no doubt that the learned Subordinate Judge intended to find that as a matter of fact the plaintiff did not know prior to his purchase, that the judgment-debtor had no right to the property. This is a finding of fact with which we cannot interfere in second appeal.

The third point taken is that Buzlar Sobhan and the defendant's lessors ought to have been made parties to the suit. No issue, however, was raised on this point, nor are we satisfied that there was any necessity for making these persons parties.

The fourth point taken is that the suit is barred by limitation. This point was not raised in either of the Courts below or in the grounds of appeal to this Court, but it is of course a point on which we must come to a decision. The learned pleader for the appellant relies on the case of *Hanuman Kamat v. Hanuman Mandur* (1). That was a case in which a member of joint family had attempted to sell certain property, but his other co-sharers objected and the sale failed. The purchaser accordingly sued for the return of the purchase-money, and their Lordships of the Judicial Committee were of opinion that a case of that nature must fall either under Article 62 or Article 97 of the Second Schedule of Limitation Act. Their Lordships held that if there never was any consideration, then the price paid by the purchaser was money had and received to his account by the vendor. We are unable to distinguish this case in principle from the case before us ; and if as a matter of fact Buzlar

had no right at all to the property that was sold and no delivery of possession in consequence, there was no consideration at all for the purchase-money that was paid; and the suit would come under Article 62 and would be barred by limitation. But with regard to this point it has been pointed out to us that the learned Subordinate Judge found that the sale was fraudulent. The Subordinate Judge remarks :—"I would further add that in the present case there is a distinct allegation in the plaint of fraud which has been substantiated by copy of judgment, exhibit 3, so far at least as the decree in execution of which the property was sold is concerned." If the suit is regarded as a suit for relief on the ground of fraud it would clearly be within time. This question of fraud was not incorporated in the issues although it was raised in the plaint, but it appears to have been raised and discussed in some way or other because both the Munsif and the Subordinate Judge referred to the point and considered it. The findings, however, on this point are not sufficiently distinct to justify us in dismissing the appeal at once. If as a matter of fact the defendant advertized this property for sale as the property of Buzlar Sobhan Chowdhury and invited the public generally to come and bid for it, knowing perfectly well all the time that this property did not belong to Buzlar Sobhan, that undoubtedly would be fraudulent conduct for which the plaintiff or any other member of the public invited to bid who was injured by it, would be entitled to relief. But, as we have said, there is no distinct finding to this effect.

We think that the proper order to pass in this case is that the suit shall go back to the Subordinate Judge for a clear finding on this point, whether the sale was fraudulent and the plaintiff was induced by that fraud to purchase the property. As the point was not raised in the issues although it was discussed when the suit was decided, the parties should be allowed to furnish fresh evidence on the point.

In conclusion it has been argued that the learned Subordinate Judge was wrong in awarding interest at 12 per cent., but we do not think that we should interfere with his decision on this point.

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The case will accordingly be remanded to the Subordinate Judge for the decision of the point which we have set out above. The Subordinate Judge will return his finding to this Court, and on receipt of this finding the appeal will be finally disposed of by this Court.

S. A. A. A.

Case remanded.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

1909
 June 17.

DAYANATH THAKUR

v.

EMPEROR.*

Magistrate, powers of—District Magistrate, power of, to cancel bond for keeping the peace or for good behaviour—Order directing prosecution for using forged rent-receipts in a proceeding before a subordinate Magistrate, for keeping the peace, and for abetment thereof—"Judicial proceeding"—Criminal Procedure Code (Act V of 1898) ss. 4 (m), 125, 476.

Section 125 of the Criminal Procedure Code gives the District Magistrate the power to cancel a bond for keeping the peace for reasons which appear to him sufficient, but not the right to hear an appeal from an order in a proceeding under s. 107 passed by a subordinate Magistrate.

A District Magistrate has no jurisdiction under s. 476 of the Code to direct a prosecution for dishonestly using a forged document and for abetment in respect of rent-receipts filed before a subordinate Magistrate in a case under s. 107 of the Code, which has been disposed of by him under s. 125, the proceeding under which is not a "judicial proceeding."

ON the petition of Dayanath Thakur that he was obstructed in the cultivation of certain lands, which he had recently purchased from Harihar Misser, by Mohari Lal Marwari and three others, and that there was a likelihood of a breach of the peace in consequence, the Subdivisional Magistrate of Madhepura drew up a proceeding under section 107 of the Criminal Procedure Code against Mohari Lal and the others. During the hearing of the case the petitioner, Dayanath, filed four

* Criminal Revision No. 505 of 1909, against the order of F. F. Lyall, District Magistrate of Bhagalpore, dated April 21, 1909.

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rent-receipts before the Magistrate which he had obtained from Harihar. The accused were bound down, on the 19th November 1908, to keep the peace for one year. They then moved the District Magistrate of Bhagalpore. The application purported to be a "*criminal motion*," and the District Magistrate, after dealing with the facts of the case, found the rent-receipts to be forged, and "*allowed the appeal*," on the 23rd December 1908, stating at the same time that, if the "*appellants*" could adduce sufficient evidence to warrant him in holding a further inquiry, he was prepared to do so, and calling upon them to file their collection books within two days. An application was then filed on their behalf, on the 25th January 1909, explaining their inability to produce the collection papers and asking for sanction to prosecute the petitioners. The District Magistrate thereupon proceeded, as he submitted in his explanation, under section 476 of the Code, issued notices to the petitioners, and, after holding an inquiry, passed an order on the 21st April, directing the prosecution of the petitioner, Dayanath, under section 471 of the Penal Code, and of Harihar for abetment.

The petitioners then moved the High Court and obtained the present Rule on various grounds.

Mr. P. L. Roy (with him Babu Atulya Charan Bose and Babu Naresh Chandra Sinha), for the petitioners, after dealing with the other grounds in the application for revision, contended that the alleged offences did not come to the notice of the District Magistrate in the course of a judicial proceeding, and that, in consequence, the provisions of section 476 did not apply.

CASPERSZ AND RYVES JJ. This is a Rule calling upon the District Magistrate to show cause why the prosecution of the petitioners should not be cancelled for the reasons stated in the petition.

It appears that proceedings were instituted under section 107 of the Code of Criminal Procedure against one Mohari Lal Marwari at the instance of the petitioner, Dayanath Thakur. In the course of these proceedings the petitioner filed certain

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rent-receipts. The Magistrate trying the case passed orders binding down Mohari Lal under section 107 of the Criminal Procedure Code. Thereupon, Mohari Lal applied to the District Magistrate to have the order set aside. The learned District Magistrate treats the matter as one coming under section 125 of the Criminal Procedure Code, and calls it a "Criminal Motion." After going into the merits of the application he came to the conclusion, apparently without hearing Dayanath Thakur, that the rent-receipts which he had filed were forged, and he concluded these proceedings with the remark that "the *appeal* was allowed," and directed notice to be issued to Dayanath Thakur to show cause why he should not be prosecuted under section 471 of the Indian Penal Code. It appears to us, as has been laid down in the case of *Nabu Sardar v. Emperor* (1), decided by a Full Bench, that under section 125, Criminal Procedure Code, the Magistrate has full power to cancel the bond for reasons which appear to him to be sufficient; but that section does not give him a right to hear an appeal. It is difficult to see, in this case, how it can be held that these rent-receipts came before the Magistrate in a "judicial proceeding." On this ground alone, we make this Rule absolute and direct that the proceedings be set aside.

Rule absolute.

E. H. M.

(1) (1906) I. L. R. 34 Cal. 1.

APPELLATE CIVIL.

Before Mr. Justice Richardson and Mr. Justice Chatterjee.

JAGATTARA DASSI

v.

DAULATI BEWA.*

1909

June 28.

Landlord and Tenant—Decree against recorded tenant, effect of—Representation, principle of.

When the recorded tenant represents a holding on behalf of all his co-sharers, such holding passes by a sale in execution of a decree for arrears of rent obtained by the landlord against such tenant.

Ashok Bhuiyan v. Karim Bepari (1) discussed.

SECOND APPEAL by the defendant No. 4, Jagattara Dassi.

This appeal arose out of a suit brought by the plaintiff to recover possession of an eight-anna share of the disputed lands after establishment of title thereto by right of inheritance. The plaintiff stated that her father-in-law had a *jama* under one Bejoy Sankar Sikdar and others; that on her father-in-law's death defendant No. 1 and plaintiff's husband, who were brothers, were in possession of the said *jama* in equal shares; that her husband died 7 or 8 years ago leaving her, a son and a daughter, as heirs; that on the death of her son and daughter, she remained in possession of the eight-anna share by receiving rent from the tenants; that in Baisakh 1313 B.S., the defendants collusively dispossessed her from the disputed lands alleging that the defendants Nos. 2 to 6 purchased this *jama* at an auction sale; and that the decree in execution of which the defendants purchased was collusive and fraudulent.

Defendant No. 4, the principal defendant in the case, pleaded, *inter alia*, that she purchased the holding in execution of the decree obtained by the landlord against the recorded

* Appeal from Appellate Decree, No. 374 of 1908, against the decree of S. B. Chowdhuri, Additional District Judge of Jessore, dated Dec. 11, 1907, confirming the decree of Amrita Lal Mukerjee, Munsif of Magura, dated April 9, 1907.

(1) (1905) 9 C. W. N. 843.

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tenant, and as such the entire holding passed to her, and that the rent-decree culminating in the auction sale was not collusive and fraudulent.

The Court of first instance decreed the plaintiff's suit. On appeal, the learned Additional District Judge confirmed the decision of the first Court. Against this decision the defendant No. 4 appealed to the High Court.

Babu Sarat Chandra Roy Choudhry, for the appellant. The learned Judge of the Court below has decided the case in favor of the plaintiff, relying upon the case of *Ashok Bhuiyan v. Karim Bepari* (1). The reasoning on which that decision is based is, if I may so submit without any disrespect to the learned Judges, not sound. The earliest and the leading case on the subject is the case of *Jeo Lal Singh v. Gunga Pershad* (2). In that case although the sale certificate showed, that only the right, title and interest of the recorded tenant was sold, yet their Lordships held that the whole tenure passed. The principle upon which the decision was based is that the recorded tenant represented the tenure on behalf of all the co-sharers. That case has ever since been followed and the principle has been applied to all cases of sales of tenures as also of occupancy holdings: *Mati Lal Poddar v. Nripendra Nath Ray Chowdhry* (3), *Nazir Mahomed Sirkar v. Girish Chunder Chowdhuri* (4), *Nitayi Behari Saha Paramanick v. Hari Govinda Saha* (5), *Rajani Kant Guho v. Uzir Bibi* (6) and *Afraz Mollah v. Kulsumannessa Bibee* (7). The fact that the Tenancy Act makes provision for the registration of the names of the heirs of a deceased tenure-holder and not of the heirs of a deceased raiyat, does not make any difference, for section 16 clearly shows that the object of those provisions is for the protection of tenants under such tenure-holders.

No one appeared for the respondents.

Cur. adv. vult.

(1) (1905) 9 C. W. N. 843.

(4) (1897) 2 C. W. N. 251.

(2) (1884) I. L. R. 10 Cal. 996.

(5) (1899) I. L. R. 26 Cal. 677.

(3) (1897) 2 C. W. N. 172.

(6) (1902) 7 C. W. N. 170.

(7) (1905) 10 C. W. N. 176.

RICHARDSON AND CHATTERJEE JJ. In this suit the plaintiff, Daulati Bewa, sought to establish her title to an eight-anna share of a raiyati holding by right of inheritance.

It appears that the holding originally stood in the name of Narandi Sheikh, the plaintiff's father-in-law. On his death, it descended to the plaintiff's husband and to his brother, the defendant No. 1. The name of the latter only was recorded as tenant in the landlord's office. Subsequently, the plaintiff's husband died leaving his widow, a minor son and a daughter. The two children also died; and, under the Mahomedan Law, the plaintiff became entitled, as between herself and her brother-in-law, to a four-anna $1\frac{1}{2}$ pies share of the holding. Her suit, if it succeeds at all, can only succeed to that extent.

The only other defendant who need be mentioned is defendant No. 4. She contends that the whole holding was purchased by her at a sale held in execution of a decree for arrears of rent obtained by the landlord of the holding against the recorded tenant.

In the Court of first instance, the plaintiff obtained a decree to the extent of her share as above determined. The decree has been confirmed on appeal by the learned Additional District Judge, and the defendant No. 4 has appealed to this Court.

The judgment of the Additional District Judge rests entirely on the ruling of this Court in the case of *Ashok Bhuiyan v. Karim Bepari* (1). It was there held that there being no law obligatory on tenants who are not tenure-holders to get their names recorded in the landlord's *sherista* for the purpose of perfecting their title, the sale of a jote in execution of a decree for rent obtained against the recorded tenants does not pass the interest of the tenants whose names are not registered in the landlord's *sherista*. The case of *Nitayi Behari Saha Paramanick v. Hari Govinda Saha* (2) was distinguished on the ground that in that case there was a tenure and the tenants were bound to register their names in the landlord's *sherista*.

We think, however, that the case of *Ashok Bhuiyan v. Karim Bepari* (1) has been given a significance more far reaching than

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(1) (1905) 9 C. W. N. 843.

(2) (1899) I. L. R. 26 Cal. 677.

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was intended, and that the language employed in the judgment means no more than that a landlord is not justified in treating the registered tenant of a raiyati holding as the sole tenant merely because his co-sharers in the holding are not registered. The principle of representation is not referred to and there is no necessary implication that that principle cannot apply to a raiyati holding. There is nothing in the case which prevents the whole body of tenants of a raiyati holding electing to treat one of their number as their representative in their dealings with the landlord. But registration is not everything. The fact that only one tenant is registered is merely an item in the evidence upon the question whether he is or is not the representative tenant *quâ* the landlord.

In further support of our view of *Ashok Bhuiyan's case* (1), we may mention that no reference is made to previous cases in which the principle of representation has been applied or treated as applicable to raiyati holdings, for instance : *Mati Lal Poddar v. Nripendra Nath Roy Chowdhury* (2), *Ananda Kumar Naskar v. Hari Dass Haldar* (3), *Rupram Namasudra v. Iswar Namasudra* (4), *Rajani Kant Guho v. Uzir Bibi* (5). There is also the subsequent case of *Afraz Mollah v. Kulsum-annessa Bibee* (6).

Moreover, it may be observed that under the present rent law, as enacted in the Bengal Tenancy Act, the distinction between tenures and raiyati holdings in the connection we are now considering, has been largely obliterated. It was pointed out in the case of *Ambika Pershad v. Chowdhry Keshri Sahai* (7), that under the Bengal Tenancy Act a suit by a raiyat for the registration of his name in the landlord's *sherista* cannot be maintained because it is no longer compulsory for the zemindar to register the name of any tenant in his *sherista*. The Act, it is said, provides for the official registration of transfers of the rights of permanent tenure-holders and raiyats holding

(1) (1905) 9 C. W. N. 843.

(4) (1902) 6 C. W. N. 302.

(2) (1897) 2 C. W. N. 172.

(5) (1902) 7 C. W. N. 170.

(3) (1900) I. L. R. 27 Calc. 545.

(6) (1905) 10 C. W. N. 176.

(7) (1897) I. L. R. 24 Calc. 642.

at fixed rents. But the transfers of occupancy rights are not so registered and there is no provision of law by which they can be registered in the landlord's *sherista*. This case was referred to in the case of *Moti Lal Singh v. Sheik Omar Ali* (1), where it was held that a *se-patnidar* is not entitled to sue a *dar-patnidar* to compel him to register his name in his *sherista* as the transferee of a *se-patni* tenure, but it is open to him to sue for a declaration of his right as the tenant of the *dar-patnidar*. The following passage may be quoted from the judgment :—"It is clear from a ruling of this Court in the case of *Ambika Pershad v. Chowdhry Keshri Sahai* (2), that such a suit is not maintainable under the provisions of the Bengal Tenancy Act. The question then arises whether it is maintainable under the provisions of the Patni Regulation (VIII of 1819) or of any other Statute. On the whole, we are of opinion that it is not. There is no section in Regulation VIII of 1819 expressly giving a *se-patnidar* a right to compel his superior talukdar to register his name or a right of suit in case of his refusal to do so. We do not think that sections 5 and 6 of that Regulation give the plaintiff any such right, the word *patnidar* in these sections, in our opinion, not including a *se-patnidar* and the words 'other superior' not being applicable to a *dar-patnidar*. Under the former rent law, a *se-patnidar* or other dependent talukdar had a right to compel his superior to register his name in his *sherista* under section 27 of Act X of 1859 and section 26 of Act VIII (B.C.) of 1868, but not under the Patni Regulation. Under the former Act, the dependent talukdar could apply to the Collector in case of the superior tenant's refusal to register his name, under the latter Act, it would appear he might bring a suit in the Civil Court. However this may be, both these Acts have now been repealed in Bengal, and therefore it appears to us that the plaintiff has now no right to bring such a suit as the present, and as he cannot bring such a suit under the provisions of the Bengal Tenancy Act, this appeal must be decreed and the suit dismissed on this ground. It was no doubt open to the plaintiff to sue for a

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(1) (1898) 3 C. W. N. 19.

(2) (1897) I. L. R. 24 Cal. 642.

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declaration of his right as the defendant's tenant, but he has not framed his suit in this way."

The provisions of the Bengal Tenancy Act, which are referred to in the former of these two cases as introducing a system for the official registration of permanent tenures, are contained in sections 12 to 18, and it is doubtful whether these provisions were intended so much for the benefit of the superior landlord as for the protection of the tenants under the tenureholder. Section 16, for instance, provides that a person becoming entitled to a permanent tenure by succession shall not be entitled to recover, by suit, distraint or other proceedings, any rent payable to him as the holder of the tenure, until the Collector has received the notice and fees referred to in the last foregoing section.

In the present case the learned Additional District Judge has expressly and, we think, wrongly refrained from considering the question whether the recorded tenant represented the holding in dispute. He is also, we think, mistaken in saying that the case of *Rajani Kant Guho v. Uzir Bibi* (1), "enunciates the principle that the landlord is not bound to look beyond his record." The question under the present law is always one of fact, whether the recorded tenant represents the holding or not.

In the view we take, the decree of the Additional District Judge must be set aside, and the case remanded to him for the purpose of being re-heard with reference to the observations which we have made.

Costs will abide the result.

S. C. G.

*Appeal allowed ;
case remanded.*

(1) (1902) 7 C. W. N. 170.

APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Richardson.

INDRA NATH BANERJEE

v.

ROOKE.*

1900

Aug. 2.

Principal and Agent—Bribe or secret Commission accepted by Agent after transaction completed—Contracts obtained by fraud voidable, but not void—Limitation Act (XV of 1877) Sch. II, Art. 95.

The plaintiff instituted a suit against the defendants within three years from the date when the fraud as alleged in the suit became first known to him, though he had suspicions of the fraud prior to the three years. The suit was for setting aside a lease which, the plaintiff alleged, he had been induced to grant to the defendant No. 1 under fraudulent representations made to the plaintiff by the defendant No. 2, who whilst purporting to act as the plaintiff's servant or agent, received, after the lease had been duly drawn up, executed and registered, the sum of Rs. 500 from the defendant No. 1 as a bribe or secret commission by way of payment for the services rendered to the latter in connection with the making of the arrangements for the execution of the lease :—

Held, that mere suspicion is not knowledge, and the suit was not barred by limitation.

Held, further, that a bribe is nevertheless a bribe because its payment is postponed. When a bribe has been given, it is immaterial to inquire what, if any, effect the bribe had on the mind of the receiver and whether he was influenced thereby to recommend to the plaintiff an arrangement with the appellant which he would not otherwise have recommended.

Harrington v. Victoria Graving Dock Company (1) and *Shipway v. Broadwood* (2) referred to.

Held, further, that a contract induced by fraud is only voidable, and the remedy by rescission is open only so long as the parties can be restored to the relative position which they originally occupied.

Urquhart v. Macpherson (3) followed.

Clough v. London and North Western Railway Company (4) referred to.

APPEAL by Indra Nath Banerjee, the defendant No. 1.

The plaintiff, E. G. Rooke, was the owner of a one-sixth share of the *dar-patni* right of Mouzah Jote Janki. On the 28th

* Appeal from Original Decree, No. 354 of 1907, against the decree of Aghore Chandra Hazra, Subordinate Judge of Burdwan, dated July 24, 1907.

(1) (1878) L. R. 3 Q. B. D. 549.

(3) (1878) L. R. 3 App. Cas. 831.

(2) [1899] 1 Q. B. 369.

(4) (1871) L. R. 7 Ex. 26.

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June 1898 the defendant No. 1, Indra Nath Banerjee, obtained from the owners of the remaining five-sixth share a *se-patni* lease. On the 3rd June 1899 the defendant No. 1 instituted a suit for partition against the plaintiff. Shortly after the institution of this partition suit, the defendant No. 2, one Bijoy Gobinda Chatterji, approached the plaintiff and, on certain representations made to him, induced him to compromise the suit which was finally withdrawn on the 8th June 1899. In the compromise it was agreed that the plaintiff should give the defendant No. 1 a *mokarari* lease of the mineral rights in his one-sixth share of his *dar-patni* interest and the lease was accordingly duly drawn up, executed and registered on the 21st September 1899. Subsequently, on the 18th August 1904 relying on the *mokarari* lease, the plaintiff instituted a suit against the defendant No. 1 for arrears of royalty due under the said lease. This suit was decreed by the Munsif in the plaintiff's favour, and, on the 26th August 1906, the appeal preferred in the same was dismissed. On the 27th June 1905 the plaintiff instituted a second suit against the defendant No. 1 for recovery of a part of the *lakheraj* lands to which he was entitled under the *mokarari* lease of 1899 and of which the plaintiff alleged he had been dispossessed. On the 31st January 1906 the Munsif dismissed this suit which on appeal was also dismissed by the Subordinate Judge on the 6th August 1906. Before the hearing of the appeals in the aforesaid two suits, the present suit was instituted on the 4th May 1906 by the plaintiff against the defendant to set aside the said *mokarari* lease on the ground of fraud, the fraud alleged being that some time after the execution of the said lease the defendant No. 1 caused the payment of Rs. 500 to be made to the defendant No. 2 as a bribe or secret commission in respect of services rendered by the latter during the negotiations which led up to the compromise and the lease, and in which he purported to act as the plaintiff's servant or agent. This suit was decreed with costs by the Subordinate Judge. The defendant No. 1, thereupon, appealed to the High Court.

Dr. Rashbehary Ghose (with him *Babu D. N. Chakrabarty*, *Babu Narendra Nath Sett* and *Babu Sailendra Nath Palit*), for the appellant. The fraud on which the plaintiff relied has not been sufficiently set out in the pleadings, and it was incumbent on the plaintiff to have done so, if he intended to rely on the fraud. The plaintiff in the two suits, which he prosecuted up to the Court of Appeal, had based his claim on the lease and he has now alleged that this lease has been granted by him in consequence of fraudulent representations made to him. He has by his conduct waived his right to treat this as a fraud. Further, this suit is barred by limitation, as it has been instituted after three years from the date of the alleged fraud. The present suit is one for avoiding or cancelling a lease and not for damages. The plaintiff has had conferred on him certain advantages by the defendant No. 1 in return for other advantages to the said defendant and he did not offer to give up these advantages. It is quite impossible to restore the parties now to their former position. The sum of Rs. 500 which has been paid to the defendant No. 2 under the orders of the defendant No. 1, was not paid as a bribe or commission.

Babu Umakali Mookerjee and *Babu Joy Gopal Ghosh*, for the respondent.

Cur. adv. vult.

RICHARDSON J. The plaintiff in this case has one-sixth share of a *dar-patni* comprising Mouzah Jote Janki. The defendant No. 1, Babu Indra Nath Banerjee, obtained from the owners of the remaining five-sixth share of the *dar-patni* a lease of that share as *se-patnidar*. The lease is dated the 28th June 1898. On the 3rd June 1899, the defendant No. 1 instituted a suit for partition against the present plaintiff, Mr. Rooke, which suit was terminated by a compromise and withdrawn on the 8th June 1899, each party paying his own costs. It appears that under the compromise Mr. Rooke agreed to give the defendant No. 1, a *mokarari* lease of the mineral rights in his share of *dar-patni* interest. That lease was duly drawn up, and it was executed and registered on the 21st September 1899. Mr. Rooke brings the present suit to set aside

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the lease on the ground of fraud, the fraud alleged being that some time after the execution of the lease, Babu Indra Nath Banerjee caused a sum of Rs. 500 to be paid to defendant No. 2, Bejoy Gobind Chatterjee, as a bribe or secret commission in respect of services rendered by the latter during the negotiations which led up to the compromise and the lease, and in which he purported to act as Mr. Rooke's servant or agent.

It is admitted that the amount stated was in fact paid to the defendant No. 2 under the orders of the defendant No. 1 sometime between November 1899 and February 1900; but it is denied that the money was paid as a bribe or commission. An entry of the payment was made in the accounts of the defendant No. 1, under date the 23rd August 1900. Mr. Rooke asserts, and the statement may be accepted, that the payment came to his knowledge on the 20th April and 1st May 1906, owing to disclosures made on those dates in the course of the evidence given by certain witnesses in another suit. To conclude this brief sketch of the facts, it may be stated that Mr. Rooke on the 18th August 1904 instituted, against the defendant No. 1, a suit (No. 1462 of 1904) for arrears of royalty due under the lease of 1899. The Munsif's judgment in Mr. Rooke's favour was pronounced on the 27th January 1906, and the Subordinate Judge's judgment dismissing the appeal on the 26th August 1906. On the 27th June 1905 Mr. Rooke instituted another suit (No. 126 of 1905) against the defendant No. 1 on the allegation that the latter had dispossessed him of part of the *lakheraj* lands to which he was entitled under the lease of 1899. The Munsif's judgment dismissing the suit was pronounced on the 31st January, the appeal by Mr. Rooke being dismissed by the Subordinate Judge on the 6th August 1906. Mr. Rooke apparently contested both these suits on appeal relying on the lease of 1899, though the appeals came on for hearing after the date on which the present suit was instituted (the 4th May 1906).

I turn now to the terms of the lease of 1899. The lease was a permanent lease of the lessor's underground rights in respect of the coal in his share of the *dar-patni*. No *salami*

was paid, but the defendant No. 1 agreed to admit Mr. Rooke's *lakheraj* rights (about which there had been some dispute) in 99 bighas of land in Mouzah Jote Janki comprised in six plots described in the Schedule. The plots adjoin one another and form therefore a compact block. The rate of royalty provided by the lease was six annas per ton for steam coal, the plaintiff being entitled to one anna per ton in respect of his one-sixth share of the *dar-patni* subject to a minimum of Rs. 72 a year.

The learned Subordinate Judge has given the plaintiff a decree setting aside the lease and directing the plaintiff to refund to the defendant No. 1 the amount of Rs. 108 recovered by him in Suit No. 1462 of 1904 on account of royalty under the lease, and prohibiting the plaintiff from executing his decree in that suit. From this decree the defendant No. 1 appeals.

In the first place it is contended for the appellant that the plaintiff does not sufficiently set out in the plaint the fraud he alleges, or that the fraud found by the Subordinate Judge is a fraud of some different kind from the fraud alleged in the plaint. We think that there is no substance in this contention, and that it is sufficiently refuted by a reference to paragraphs 13 and 14 of the plaint.

It is next urged for the appellant that the suit is barred by limitation under Article 95 of the second Schedule of the Limitation Act. Mr. Rooke admits that shortly after the execution of the lease of the 31st September 1899, he had reason to suspect that the lease had been obtained by fraud; but he says in effect that he had no certain information on the subject on which he could act before the disclosures of April and May 1906. We think that this is a good answer to the objection under consideration. Mr. Rooke had no substantial ground to go upon until he came to know of the payment which had been made to Bejoy, and until then it appears to us that the fraud alleged did not become known to Mr. Rooke within the meaning of Article 95. Mere suspicion is not knowledge. After the payment was disclosed there was no delay on Mr. Rooke's part in bringing this suit. We are clearly of opinion that the suit is not barred by limitation.

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Then, again, on the principal questions of fact involved, we think we must accept the conclusions arrived at by the learned Subordinate Judge. There is no doubt in our minds that during the negotiations which preceded the lease, defendant No. 2, Bejoy, was a servant or agent of the plaintiff, Mr. Rooke, and that it was Bejoy's duty to do the best he could for Mr. Rooke, uninfluenced by any considerations of his own interest. The fact that it is admitted that the money was paid does not alter the character of the payment. Asked to explain why the money was paid, the defendant No. 1 himself said: "I never paid any money to Bejoy to bring about the compromise, but I directed payment of Rs. 500 to Bejoy out of Jote-Janki funds as a present or reward—call it *dalali* or call it anything—because Bejoy expected me to pay him something: because Bejoy asked me if I would not show him some favour now that I was in a position to work my plan." We have already stated that the position of Bejoy appears to us to be clear. He is not a mere go-between, he was the servant of the plaintiff. The fact that the money was paid after the lease had been executed is immaterial if it was paid, as we think it was, in accordance with, or as the result of some previous arrangement or understanding between the appellant and Bejoy, there being evidence on the record to show that such an understanding existed. There is the evidence, for instance, of Apurbanand Roy, a servant of the appellant, who said in suit No. 267 of 1904 in the Subordinate Judge's Court "I know Bejoy Chatterjee. He was Mr. Rooke's Manager for all affairs. The meaning of which is that I heard he was his Chief Officer. Bejoy had conversation with Mr. Rooke about the settlement of his 2 annas, 13 gundas, 1 cowri, 1 krant share. He said, I can bring about the settlement if you can pay me *dalali* (brokerage). He did not tell the amount of the brokerage. He said he won't do it unless brokerage was paid. I told this to the plaintiff."

In his evidence in the present suit, Apurbanand makes the following statement:—"I met Bejoy before the settlement by Mr. Rooke with Indra Babu and had a talk with him about it. Bejoy said that he could settle the matter with Rooke if I (he)

obtained something for his troubles. I informed Indra Babu about Bejoy's demand, and he replied that that would be seen hereafter (পরে দেখা যাইবে).”

Indra Babu himself says that he refused to accept Bejoy's offer, but there is the evidence of his own servant that he left the matter open for future determination.

The evidence of Unesh Chandra Mukherjee, witness for the plaintiff, who was formerly a *mohurir* of the defendant No. 1 in the days when he practised as pleader at Burdwan, may also be referred to in connection with the relation of Bejoy to the plaintiff.

On the evidence we see no reason at all to doubt that payment in question had a corrupt taint and that the understanding, express or tacit, which existed in regard to it during the negotiations, placed Bejoy in a position in which his personal interests conflicted with his duty to his employer. A bribe is nevertheless a bribe, because its payment is postponed and the expectation of a bribe or reward from the appellant gave Bejoy a motive or incentive for acting contrary to his duty.

But, then, it is said that the negotiations were not in fact affected by the payment or understanding with regard to it. There is, however, good authority in support of the proposition that when a bribe has been given it is immaterial to enquire what, if any, effect the bribe had on the mind of its receiver. I refer to the cases of *Harrington v. Victoria Graving Dock Company* (1) and *Shipway v. Broadwood* (2). The salutary rule laid down by these cases applies equally to the expectation of a bribe. In the present case, therefore, it is immaterial to consider what effect the expectation of this payment had on the mind of Bejoy, and whether he was influenced thereby to recommend to the plaintiff an arrangement with the appellant which he would not otherwise have recommended. There is, moreover, the further consideration that the money subsequently given to Bejoy might, if there had been no understanding between him and the appellant, have been paid to the plaintiff as *salami*.

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(1) (1878) L. R. 3 Q. B. D. 549.

(2) [1899] 1 Q. B. 369.

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Before leaving this part of the case, I may add that it is idle for the appellant to say that payments of this kind are made every day. When they are brought to light and come before a Court of Justice, they must be treated as what they are. Payments in the nature of a bribe or secret commission are open to the greatest reprehension.

But when all this has been said, it still remains to consider whether the present suit—a suit for rescission—is maintainable in the circumstances.

It was argued on behalf of the appellant that Mr. Rooke, though he had instituted this suit, and thereby elected, so far as it lay in his power to do so, to rescind the lease, nevertheless, by reason of the fact that he subsequently prosecuted one appeal and defended another on the footing that the lease was a valid and subsisting lease, was precluded from seeking to rescind the lease. That contention appears to me to be difficult to support. I am disposed to think that the determination to rescind was definitely made on the 4th May 1906, and that what was done subsequently in the suits previously instituted would not affect that determination. For the appellant, reference was made in this connection to the case of *Clough v. The London and North Western Railway Company* (1), an authority which, in my opinion, is not of much assistance to the appellant in the present circumstances. It might be said here that the plaintiff's action in the two appeals was merely inadvertent, the suits having been instituted, and the appeals preferred before the present suit was instituted. It seems unreasonable to suppose that what occurred was sufficient to deprive the plaintiff of his right to proceed with a suit already instituted. It is unnecessary, however, to express a definite opinion on the point, because there appears to be a broader ground on which this suit should be dismissed. A contract induced by fraud is only voidable, and the remedy by rescission is open only so long as the parties can be restored to the relative positions which they originally occupied. In the case of *Urquhart v. Macpherson* (2) their Lordships of the Privy Council speak of

(1) (1871) L. R. 7 Ex. 26, 35.

(2) (1878) L. R. 3 App. Cas. 831.

the ordinary principle that "contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is, or may be, injured by the fraud, subject to the condition that the other party, if the contract is disaffirmed, can be remitted to his former state." Other authorities will be found cited in the text books, and reference may be made to Leake on Contracts, Edition 1906, at page 258. In the present case, it is, in our opinion, impossible to restore the appellant to his original position. There is an alternative remedy to a party who has been induced by fraud to enter into a contract, and that is to sue for damages, and we think that that is the remedy which the plaintiff (if he had been well-advised) should have asked for here.

A glance at the lease and at what has been done under it will make the position clear. In the first place the lease does not stand altogether by itself. It is a part of the compromise under which the suit for partition brought by the appellant was withdrawn. The withdrawal of the suit for partition by the appellant must be taken into consideration as being part of the whole arrangement between the parties. Then under the lease the plaintiff obtained an admission from the appellant of his title to the 99 bighas of *lakheraj* land mentioned above. He has been in possession of that land all this time. He has not, so far as we know, offered to surrender any of the rights which the lease gave him in respect of that land; and, thirdly, under the lease the defendant No. 1 has laid out large sums of money—Rs. 90,000 we are told—on a colliery, and no suggestion is made how that expenditure or the business of the colliery is to be dealt with if the lease is rescinded.

Having regard to all the circumstances, we are clearly of opinion that it is impossible now to put the appellant back in his original position and that the plaintiff has misconceived his remedy and should have asked for damages. We cannot award him damages because the claim for damages was not pressed in the lower Court and there is no claim of that kind before us. But even if we were in a position to consider the question on the evidence as it stands, it is not shown that the plaintiff

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sustained damage much in excess of the sum of Rs. 500 paid to Bejoy. It is clear that if that money had not found its way into Bejoy's pocket, that or a larger amount might have been paid to the plaintiff by way of *salami* for the lease. But in regard to the rates of royalty, it does not appear that they are below the rates prevalent in the neighbourhood. The evidence indeed tends rather to show the contrary. Nor is it shown that the amount of minimum royalty reserved is below the amount reserved in cases of this kind. It must be remembered that the coal had not been worked at the date of the lease.

For the reasons indicated, we are of opinion that the decree of the Subordinate Judge must be set aside and the suit dismissed.

In the circumstances we make no order as to costs.

SHARFUDDIN J. I fully agree with the remarks of my learned brother and fully concur.

Appeal dismissed.

O. M.

CRIMINAL REVISION.

Before Mr. Justice Coxe and Mr. Justice Ryves.

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Security for good behaviour—Joint inquiry against members of a gang—Admissibility of evidence of association with a gang and of acts by the members thereof—Inquiry into the fitness of Sureties—Rejection on the report of a subordinate Magistrate or police officer—Order of Judge on reference, contents of—Criminal Procedure Code (Act V of 1898) ss. 117 (4), 122, 123 (3), 367, 424—Evidence Act (I of 1872) s. 11.

An order under s. 123 (3) of the Criminal Procedure Code should show on the face of it that the Sessions Judge has considered the case of each accused on its own merits and separately from that of the others, even if such order need not contain all the details required by s. 367.

Jamait Mullick v. Emperor (1) referred to.

A joint inquiry under s. 117 of the Criminal Procedure Code against the members of a gang formed for the purpose of habitually cheating in concert is not illegal under sub-s. (4), though they were not all concerned together in each of the various acts alleged against them.

When the question is whether a person is a habitual cheat, the fact that he belonged to an organization formed for the purpose of habitually cheating in concert is relevant under s. 11 of the Evidence Act, and it is open to the prosecution to prove against each person that the members of the gang do cheat.

A surety cannot be called upon to state in writing what influence he has over the accused, nor can a Magistrate refuse to accept him on his failure to do so.

Per RYVES J. (COXE J. contra).—Under s. 122 of the Criminal Procedure Code the Magistrate passing an order for security should himself hold the inquiry into the fitness of the proposed sureties, and he cannot decide the matter merely on the report of a subordinate Magistrate or of a police officer, which is not legal evidence.

Queen-Empress v. Prihi Pal Singh (2), *Emperor v. Tota* (3), *Emperor v. Balwant* (4), *Re Abdul Khan* (5) and *Suresh Chandra Basu v. Emperor* (6) followed.

* Criminal Revision No. 670 of 1909, against the order of E. G. Drake-Brockman, Sessions Judge of Dacca, dated April 5, 1909.

(1) (1907) I. L. R. 35 Calc. 138.

(4) (1904) I. L. R. 27 All. 293.

(2) (1898) All. W. N. 154.

(5) (1906) 10 C. W. N. 1027.

(3) (1903) I. L. R. 25 All. 272.

(6) (1904) 3 C. L. J. 575.

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UPON the receipt of a report from the Sub-Inspector of Kotwali Police Station, dated the 21st July 1908, containing information against 23 persons as being members of a gang of swindlers, the Additional District Magistrate of Dacca drew up proceedings under section 110 of the Criminal Procedure Code against them, which were subsequently amended, alleging that they "habitually committed cheating and extortion, being members of a gang formed for this purpose." It appeared from the report that the gang had been in existence for the last ten years under the leadership of Chunnu Mian, and was gradually increasing in numbers and consisted then of 64 persons. The prosecution gave evidence at the inquiry of 47 specific acts of cheating and extortion of various descriptions committed by the gang, during a period of four or four-and-a-half years past, in the town of Dacca, in outlying villages and on boats on the river. The accused were not all concerned in every transaction narrated, but different persons took part in different instances. The evidence of the approver showed that the proceeds of their depredations were shared equally by the members of the gang. Their ordinary *modus operandi* appeared to be as follows. Some of the confederates ingratiated themselves with the selected victim, and then inveigled him into one of their dens under the pretext of securing for him a lucrative appointment, or a profitable purchase of gold, silver, jewellery, cloths or other articles, or a share in a profitable business. In some cases, after doing so, money was taken from him as pretended security for the appointment, or as an advance on the sale of the articles, or as a loan on the false promise of executing the necessary documents. In other instances the accused represented to the dupe that a wealthy zemindar had come to Dacca from another district and was squandering his money in gambling, and could be easily fleeced of large sums by *cowrie* play which they exhibited. Shortly after, one of the petitioners, personating the zemindar, used to appear on the scene richly and gaudily dressed and engage in play. The person duped was induced to play, or one of the confederates played for him with his money, and after winning a few small sums for him

pretended to have lost the whole amount. In several cases money was forcibly taken away, and the victim turned out of doors, or he was drugged and robbed of all he had.

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Sixteen persons were jointly proceeded against, but, on the 8th March 1909, the Additional District Magistrate discharged three of them and directed the others to execute bonds in the amount of Rs. 400 each, with three sureties each in the like sum, to be of good behaviour for three years, and in default to undergo rigorous imprisonment for the same term. The Magistrate in his judgment, after giving a summary of the evidence of each prosecution and defence witness, dealt with it in connection with each of the petitioners separately. Upon some of the petitioners tendering sureties he called for reports from the police as to their fitness, and rejected them on perusal thereof without assigning any reason. In some cases fresh sureties were offered and the Magistrate, on application by the petitioners concerned, directed a subordinate Magistrate to inquire into their fitness and to submit a report, on the receipt of which he again refused to accept them without stating any grounds in his order, though it appeared that he wrote the order just below the subordinate Magistrate's finding and report. The sureties offered by the petitioners, Bharat Chunder Dey, Amiraddi, Rasik Chunder Dey and Haridas Dey were called upon by the Magistrate to state in writing what influence they possessed over the persons who had nominated them, and on their failure to do so he refused to accept them.

The case of the petitioners whose sureties had been rejected was submitted, under section 123 (2) of the Criminal Procedure Code, to the Sessions Judge of Dacca, who, by his order, dated the 5th April, modified the order of the Court below, in respect of the amount of the bonds and the number of the sureties of some of the accused. The material portions of his order were as follows :—

There is a mass of evidence showing that the accused have been guilty of several acts of cheating and extortion. Though all were not concerned in every instance narrated, yet the evidence shows that they were all associated together and acted in concert; different accused on different occasions. Hindus and Muhomedans indiscriminately. . . . There is no reason to disbelieve in the

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main the different stories of cheating and extortion told, and that the present accused were implicated. The accused seem to have been members of a gang which had been for some time at work in this town, and their profits on the whole were considerable. None of the accused, who have brought evidence in their defence, have been able to clear themselves of associating with the rest of the gang. . . . The order directing these accused to furnish security is a proper one. Each of them has been shown to have habitually committed acts of cheating and also of extortion, as threats were used when other means failed to induce the dupes to part with their money, though success was not always attained.

The petitioners then moved the High Court and obtained the present Rule.

Mr. Monnier (with him *Babu Sarat Chunder Basak*), for the petitioner, *Hamijuddi*. Section 239 of the Code is applicable to an inquiry under Chapter VIII: *Pran Krishna Saha v. Emperor* (1) and *Empress v. Abdul Kadir* (2). Section 117 (4) does not justify a joint inquiry in a case like this for 47 acts differing in kind, committed by different petitioners, against different persons, at different places, and at different times for a period of over four years: *Queen-Empress v. Fakirapa* (3). The "matter under inquiry" referred to in section 117 is whether each of the petitioners habitually committed extortion or cheating. Where specific acts are alleged in proof of habit they constitute the main evidence of it, and in such a case, though the fact of association as members of a gang is relevant on the question of habit, the "association" which, under clause (4), justifies a joint inquiry, is not merely membership of a gang but joint participation in the acts charged. Association with bad characters, as *evidence of habit*, must not be confused with association for the purpose of *holding a joint trial*. Further, the gang in this case was gradually increasing in numbers, but there is no evidence when the different petitioners became members of it. Those who joined later cannot be said to have been associated in the acts of the other members committed before. Those who were concerned together in one or more of the 47 transactions may be

(1) (1903) 8 C. W. N. 180, 184.

(2) (1886) I. L. R. 9 All. 452.

(3) (1890) I. L. R. 15 Bom. 491. .

jointly proceeded against, but the petitioners, who did not act in concert with the others in *any* transaction at all, were not associated with the latter within the meaning of section 117 (4). Thus Hamijuddi, who acted in concert with some of the petitioners in the several acts alleged against him, might be jointly tried with them, but he never joined the other petitioners in any act done by them and his joint trial with the latter is bad in law. This view is not inconsistent with *Srikanta Nath Shaha v. Emperor* (1). In any case the petitioners were prejudiced by the joint inquiry. Each one had to meet not only the acts alleged against him, but practically the series of acts laid against the others also. Most of the incidents are spoken to by a single witness, whose evidence taken by itself might not have been held sufficient to prove the transaction, but the cumulative effect of the similar evidence of the other witnesses tended to belief in the truth of his story. In the next place section 122 of the Code contemplates an inquiry into the fitness of sureties by the inquiring Magistrate himself. He cannot act on the report of a subordinate Magistrate or of a police officer, which is not legal evidence : *Queen-Empress v. Prithi Pal Singh* (2), *Emperor v. Tota* (3), *Emperor v. Balwant* (4) and *Suresh Chandra Basu v. Emperor* (5). An inquiry under the section is a judicial proceeding : *Emperor v. Ghulam Mustafa* (6). The Magistrate is bound to give his own independent reasons for rejecting the sureties : *Re Abdul Khan* (7). Section 123 (1) read with section 120 (2) shows that if a person does not give security on the date of the order, where no later date is fixed, he is liable to imprisonment. The law thus contemplates that the party will be ready with his sureties on that date, and this view also militates against the delegation of the inquiry to the police or to another Magistrate. Section 192 applies only to transfer of cases of which a Magistrate has *taken cognizance originally*, and not to an inquiry under section 122 after the

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(1) (1905) 9 C. W. N. 898.

(2) (1898) All. W. N. 154.

(3) (1903) I. L. R. 25 All. 272.

(4) (1904) I. L. R. 27 All. 293.

(5) (1904) 3 C. L. J. 575.

(6) (1904) I. L. R. 26 All. 371.

(7) (1906) 10 C. W. N. 1027.

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close of the proceedings under section 117. Section 528 has still less application. Lastly, the order of the Judge is bad, as he has not dealt separately with the cases of each of the petitioners in his judgment: *Jamait Mullick v. Emperor* (1).

Mr. Hug (with him *Babu Upendra Lal Roy*), for Kalu Mirza. In a proceeding under section 110 the matter for inquiry is not the existence of a gang, but whether a person is a habitual cheat or extortioner. Evidence of the acts of others is not admissible against him.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown, (who was called upon only to deal with the irregularity in the Sessions Judge's order). The case of *Jamait Mullick v. Emperor* (1) is distinguishable as relating to the judgment of an Appellate Court. An order under section 123 (3) is not a judgment within sections 367 and 424 of the Criminal Procedure Code. The order is not defective: see *Rohimuddi v. Queen-Empress* (2).

COXE J. The petitioners in this case have obtained a Rule in the following terms:—"Let the record be sent for, and a Rule issue upon the District Magistrate to show cause why the order binding down the petitioners for good behaviour should not be set aside, or why such other order in the matter should not be passed as to this Court may seem fit, on the ground that the case of the petitioners was not separately dealt with by the Sessions Judge and the Additional Magistrate in accordance with law, and why the fitness of the sureties tendered by the petitioners should not be considered by the Magistrate himself under section 122 of the Criminal Procedure Code; and let a Rule also issue on the District Magistrate to show cause why the petitioners should not be released on the securities tendered for good behaviour, and meanwhile, pending the hearing of the Rule, let the petitioners be admitted to bail for their appearance whenever wanted to the satisfaction of the District Magistrate."

(1) (1907) I. L. R. 35 Calc. 138.

(2) (1892) I. L. R. 20 Calc. 353.

It will be seen that there are three principal points for determination, namely, (i) whether the order of the Sessions Judge confirming the orders of the Additional District Magistrate can be sustained, (ii) whether the petitioners should have been separately tried by the Magistrate, and (iii) whether the sureties tendered should have been refused.

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On the first point, the learned counsel for the petitioners relies on the decision in the case of *Jamait Mullick v. Emperor* (1), where it is laid down that the judgment of an Appellate Court should show on the face of it that the case of each accused has been taken into consideration. The learned counsel for the Crown argues that this ruling is not applicable, inasmuch as the order of the Sessions Judge is not an appellate judgment. Now, it may be open to doubt whether the provisions of sections 367 and 424, which apply to judgments in trials and in appeals, govern orders under section 123, sub-section (3). But even if they do not, it is only reasonable to require the Sessions Judge, in writing his order, to show that he has considered the case of each individual prisoner, as it is his duty to do. Even if the order need not contain all the details required by section 367, still each prisoner has a right to have his case considered on its own merits, and the order should show that this has not been lost sight of. I am not entirely satisfied that this has not been lost sight of in the present case.

On the second point, I am quite satisfied that the joint trial was perfectly legal and proper. Numerous rulings have been cited on the point, but the words of the section are perfectly clear in themselves and stand in no need of elucidation. These proceedings have been taken against the accused because they are said to belong to a gang of swindlers who (principally by means of the confidence trick) cheat ignorant people of their money, resorting occasionally to more drastic methods when the victims are not sufficiently unintelligent. The matter under inquiry is whether these persons do or do not habitually cheat in concert as members of the gang. The confidence trick cannot be worked by a single swindler. It requires numbers,

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and these people are said to have associated themselves together obviously that this difficulty may be overcome. It is argued that by this joint trial evidence of the acts of cheating committed by one member of the gang is improperly used as evidence against another. The argument does not impress me. It can hardly be disputed that evidence of habitual association with habitual cheats would be admissible as evidence against the person so associating. Indeed, evidence of association with bad characters is the commonest kind of evidence in proceedings of this nature. If that is so, it is surely relevant to give evidence as to what kind of people they are, with whom the accused associate, and if they are a gang of swindlers the fact is certainly relevant and may be proved against the accused. When the question is whether a man is a habitual cheat the fact that he belongs to an organization formed for the purpose of habitually cheating in concert is surely relevant under section 11 of the Evidence Act. If that is so, it is clearly open to the prosecution to prove against each accused that the gang is a gang of cheats, or, in other words, that the members of the gang do cheat. It would surely be impossible to hold that it may be proved that the accused associates with a gang of swindlers, but that it may not be proved against him that the members of the gang do swindle. It appears to me that the existence of this gang, and the relations of each of the accused to it, are the matters under inquiry in these proceedings, and that, as the petitioners are alleged to have been associated in these matters, the joint trial is perfectly legal. As to the argument that even if the joint trial is legal, yet separate trials ought to have been held, that has been committed by the Legislature to the discretion of the Magistrate, which I have no desire to abridge. But in my opinion this is a case in which the accused persons ought certainly to have been tried together. The Magistrate says: "No one would expect every member of a gang of this sort to be openly engaged in the actual execution of each individual swindle, but the similarity of the tactics employed, the constant association of different groups of this gang in similar swindles, the evidence of complicity

offered by several incidents in which members subsequently took a hand, and lastly the evidence of the accomplice who proves the sharing out of the profits of these transactions among the different members of the gang,—all these facts show clearly that for the purpose of swindling and extortion the accused were members of one gang.” To deal with the members of a great criminal organization like this separately would, in my opinion, have been wholly injudicious.

On the third point, there are two rulings of the Allahabad High Court, that an inquiry under section 122 must be made by the trying Magistrate himself. It has been contended by the learned counsel for the petitioners that under that section the trying Magistrate must, on the day that he decides the case, proceed to inquire on sworn testimony, without the assistance of any police or other officer, into the fitness of the sureties tendered. This means an inquiry into their financial position, their character, and their other qualifications to be accepted as good security for the good behaviour of the accused. In the present case there were 13 persons bound down and 39 sureties required, so that the case itself would have been a mere preliminary to the inquiry into the fitness of the sureties. Of course, if this is the law, it must be enforced, but it appears to me to be a superstructure out of all proportion to the simple words that constitute its foundation. Those words are—“A Magistrate may refuse to accept any surety offered under this Chapter on the ground that, for reasons to be recorded by the Magistrate, such surety is an unfit person.” That is all, and I think it is open to considerable doubt whether the section contemplates an inquiry in the form of a judicial proceeding at all. It has been held in Allahabad that such an inquiry is a judicial proceeding, and in the case of *Suresh Chandra Basu v. Emperor* (1) the learned Judges disapproved of the Magistrate’s acting on a police report, which may perhaps imply that they considered that the Evidence Act applied. The point, however, does not seem to have been fully considered.

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(1) (1904) 3 C. L. J. 575.

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I doubt whether section 122 necessitates a judicial inquiry at all; but, if it does, I see no reason why such an inquiry should not be delegated to another Magistrate. It was held in *Gurudas Nag v. Gaganendra Nath Tagore* (1), that proceedings under section 145 can be transferred, and that, even if they could not, section 529 (f) would cure the irregularity. This principle was extended to proceedings under section 107 by the decision in the case of *Surjya Kanta Roy Chowdhry v. Emperor* (2). I may refer too to *Sarat Chunder Roy v. Bipin Chandra Roy* (3) and *Ram Kissore Roy v. Dwarka Nath Sen* (4). Even assuming, therefore, that section 122 contemplates a regular judicial inquiry, I see no reason why such an inquiry, alone among inquiries under the Code, should not be subject to the operation of sections 192 and 528.

Next, it is argued that the Magistrate should have recorded his reasons. No doubt this is so, but I do not think that the omission in the peculiar circumstances of this case justifies interference in revision. The Magistrate, to whom the inquiry was transferred, recorded his reasons for rejecting the sureties, and the orders of the Additional District Magistrate, rejecting the sureties, are written just below. It is clear that he accepted the reasons of the inquiring Magistrate and made them his own. Nor could he possibly have done otherwise in most of the cases on the reasons given. As regards several of the petitioners, it does not appear from the record that they offered any sureties at all. Nor is any complaint of the rejection of sureties made in the petition on which this Rule was granted. In the case of others, their sureties were called on to attend for examination, but did not do so. It has been argued that this is not a ground for rejection, but it appears to me that it would be wholly unsafe and improper for a Magistrate to accept, as security for good behaviour, men whom he did not know himself, and who would not appear before him to be questioned. The only cases in which personally I would interfere with the rejection of the sureties are those of Bharat

(1) (1905) 2 C. L. J. 614.

(3) (1902) I. L. R. 29 Calc. 389.

(2) (1904) I. L. R. 31 Calc. 350.

(4) (1906) 10 C. W. N. 1095.

Chandra Dey, Amiraddi, Rasik Chandra Dey, and Haridas Dey. In their cases the sureties were called on to state in writing what influence they had over the accused persons, and on their failing to do so their security was rejected. This does not seem to me at all a proper order.

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My learned brother, however, considers that those who tendered sureties are entitled to have an inquiry into their fitness by the trying Magistrate. Although I am unable, with the greatest respect, to agree with his reasons, I do not think that I should dissent from him in directing further inquiry, when he deems it necessary.

Accordingly, the case will be sent back. Further inquiry should be made into the fitness of the sureties offered by the petitioners Hamijuddi Chowdhry, Kalu Mirza, Madhab Karmakar, Amiraddi Miah, Bharat Chandra Dey, Rasik Chandra Dey, and Haridas Dey. Thereafter the Sessions Judge will re-hear the proceedings under section 123 of the Code, so far as they affect the persons, who have petitioned this Court, and have not been released on security, namely, Debendra Chandra Dey, Kali Kumar Dey, Mahendra Dey, and so many (if any, of the seven men mentioned above as fail to give security.

RYVES J. I agree generally on the first and second points decided by my learned brother, but I regret I cannot agree on the third ground.

Under section 122 of the Criminal Procedure Code, it seems to me that a Magistrate should himself hold an inquiry into the fitness of the proposed sureties. This has been held in the Allahabad cases already referred to; and I agree with those rulings. The first case will be found in *Queen-Empress v. Prithi Pal Singh* (1). It was there held—"we know of no power which the law gives to Magistrates to call upon other persons to exercise the functions which are entrusted by law to Magistrates alone. It is the Magistrate who is to decide whether the surety is or is not a fit and proper person. He is to do that upon evidence and cannot do so upon a report furnished by another person, which is not evidence." The same construction

(1) (1898) All. W. N. 154.

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appears to have been accepted by the Chief Court of the Punjab. In *Re Abdul Khan* (1), it was laid down by this Court that the Magistrate should not refer the fitness of the sureties to be inquired into by the police. It was there said "the intention of the Legislature in insisting that a Magistrate should record his reasons in refusing to accept a surety on the ground of unfitness is that the Magistrate should exercise his independent judgment." Similarly in *Suresh Chandra Basu v. Emperor* (2), the Magistrate was directed himself to hold an inquiry, and his orders were set aside on the ground that he had acted on reports submitted by the police and not on an inquiry held by himself. There are obvious reasons why an inquiry of this kind should not be entrusted to the police. When the police institute proceedings under this Chapter, they usually desire that the persons proceeded against should go to jail rather than that they should furnish security and remain at large. Besides, the accused persons should certainly have an opportunity of meeting the allegations against the fitness of their sureties which they do not get if the Magistrate acts on an *ex-parte* report of the police. In this case, however, the inquiry was delegated not to the police but to a subordinate Magistrate. It was held in *Emperor v. Balwant* (3), following certain earlier cases, that "the Magistrate must satisfy himself by legal methods as to the sufficiency of the security tendered by the person against whom an order under sections 110 and 118 of the Code of Criminal Procedure has been made, and that he cannot delegate his functions in this respect to a subordinate, and cannot decide the question of the surety being a fit and proper person upon a report furnished by another person." I think we should follow these decisions.

I would, therefore, direct that the case be referred back to the learned Magistrate to hold an inquiry himself into the fitness of the sureties tendered in the case of the persons enumerated in the judgment of my learned brother, and agree in the rest of the proposed order.

E. H. M.

Case remanded.

(1) (1906) 10 C. W. N. 1027.

(2) (1904) 3 C. L. J. 575.

(3) (1904) I. L. R. 27 All. 203.

APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Chatterjee.

NARKI

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1909

Sept. 2.

Death, presumption of—Evidence Act (I of 1872) s. 108—Person not heard of for seven years—Time as to when presumption arises—Onus of proof.

When a person is not heard of for seven years, the presumption that arises under s. 108 of the Evidence Act is that he is dead at the time when the question is raised and not at some antecedent date.

Fani Bhushan Banerji v. Surjya Kanta Roy Chowdhry (1) followed.

Moolla Cassim v. Moolla Abdul Rahim (2) referred to.

SECOND APPEAL by the plaintiff, Musammat Narki.

The plaintiff, the daughter of one Shaik Moula Buksh Miyan, deceased, brought a suit for the recovery of the possession of certain holdings by virtue of a deed of gift from her father, dated the 12th August 1880, but was resisted by the defendant, Musammat Phekya, on the ground that the properties in dispute were jointly held by Moula Buksh and his brother, Halkhori, who died in 1862, and that since the death of Halkhori she as the wife of Halkhori's son, Mangru, had been in possession of a half share of the disputed lands.

Mangru had gone abroad about the year 1862, ten years prior to the death of his father, Halkhori, and had not been heard of since. Moula Buksh died after his brother, Halkhori, having executed a deed of gift in favour of the plaintiff of all his properties, including the property of which he was jointly in possession with his brother, Halkhori.

The Munsif decreed the suit on the ground that Musammat Phekya was not the heiress, because her husband, Mangru, the son of Halkhori, as appeared from the defendant's own

* Appeal from Appellate Decree, No. 722 of 1907, against the decree of Rajendra Nath Dutt, Subordinate Judge of Chapra, dated Jan. 31, 1907, modifying the decree of Ali Ahmed, Munsif of Chapra, dated July 2, 1909.

(1) (1907) I. L. R. 35 Calc. 25.

(2) (1905) I. L. R. 33 Calc. 173.

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evidence, left ten years before the death of his father, and had not been heard of ever since, and that the legal presumption was that he died during the lifetime of his father, and did not inherit.

On appeal by Musammat Phekya, the Subordinate Judge of of Chapra held that from the fact that Mangru disappeared ten years before the death of his father, the only presumption under section 108 of the Evidence Act was, that he was dead at the time of the present suit, and there was no presumption as to the time when he died, and the onus was on the plaintiff to prove that her father, Moula Buksh, inherited the full moiety of his brother, Halkhori; and that the latter's son, Mangru, having predeceased his own father, and there being no evidence as to the time of Mangru's death beyond the fact of his disappearance as stated above, the plaintiff was not entitled to succeed except to the eight annas share she received from her father and two annas share which she received from Mangru under the Mahomedan Law of inheritance. On these findings, the Subordinate Judge modified the decree of the Munsif decreeing ten annas share to the plaintiff and six annas share to Musammat Phekya, the defendant No. 3. Thereupon, the plaintiff preferred this second appeal to the High Court.

Babu Dwarka Nath Mitter, for the appellant, relied on *In re Phene's Trusts* (1) and *Moolla Cassim v. Moolla Abdul Rahim* (2), as supporting the view that when Mangru had not been heard of for ten years before his father's death, the presumption was that he predeceased his father.

Maulavi Mahomed Mustafa Khan, for the respondent, relied upon section 108 of the Evidence Act and the note thereon at page 573 of *Amir Ali and Woodroffe's Evidence Act* (4th Edition), and *Fani Bhushan Banerji v. Surjya Kanta Roy Chowdhry* (3), as showing that there was no presumption as to the time of Mangru's death, the only presumption being that he was dead at the time of suit.

Babu Dwarka Nath Mitter, in reply.

Cur. adv. vult.

(1) (1870) L. R. 5 Ch. App. 139. (2) (1905) I. L. R. 33 Calc. 173, 176.

(3) (1907) I. L. R. 35 Calc. 25.

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STEPHEN AND CHATTERJEE JJ. This case comes before us on second appeal and the facts admitted and found are as follows. The plaintiff is the daughter of one Moula Miyan who during his life was in possession of a holding jointly with his brother, Halkhori. The latter died first and Moula Miyan afterwards executed a deed of gift of all the property in question to the plaintiff. The plaintiff sues to recover possession of the holding, but her claim is resisted by defendant No. 3, on the plea that she is the widow of Halkhori's son, Mangru, and is entitled to the property in dispute jointly with the plaintiff and has been so since the death of Halkhori and Moula, and is now in possession. It is admitted that if Mangru died after Halkhori this contention is correct. All that we know about Mangru is that he went abroad about 1862, ten years before the death of Halkhori, which occurred in 1872, and has not since been heard of by those who would naturally have heard of him if he had been alive. Under these circumstances, the plaintiff in order to make out her case must establish that Mangru died before Halkhori. She has not done this by evidence, and the question is whether she can derive any assistance from section 108 of the Evidence Act. If that section applied to the case the burden of proof would shift, and instead of the plaintiff having to prove that Mangru was dead at a given time, the defendant would have to prove that he was then alive. But we are constrained to hold that it does not. In *Fani Bhushan Banerji v. Surjya Kanta Roy Chowdhry* (1), it is expressly laid down by Geidt J. that the presumption that arises on a man not having been heard of for seven years is a presumption that he is dead at the time when the question is raised, that is, in this case at the date of the suit, and not at some antecedent date, that is, at the time of Halkhori's death in 1872. The judgment of Maclean C.J. seems, on the facts mentioned in the judgment of Geidt J., to be to the same effect. A similar view was expressed by the Burmah Chief Court in *Moolla Cassim v. Moolla Abdul Rahim* (2) and was accepted by the Privy Council. This is not

(1) (1907) I. L. R. 35 Calc. 25.

(2) (1905) I. L. R. 33 Calc. 173.

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the English Law as may be seen in the judgment in the leading case of *In re Phene's Trusts* (1) and the cases there quoted, and were the matter *res integra* we are not sure that we should attribute to the words of section 108 the effect that is given to them in the cases we have mentioned. As it is, however, we have to hold that though a plaintiff alleging Mangru's death in 1869 would not have had to prove it then, the present plaintiff must prove that he was dead three years later. This state of the law may give rise to some highly anomalous situation as would be the case had Mangru's estate been administered in 1872. But in the present case the plaintiff, to make good her claim, must prove that her father was entitled to 16 annas of what he purported to give her, and to do this, must establish that Mangru died before his father which she has failed to do. Her father was, however, at the time of his gift entitled to eight annas of the property, and she is, therefore, entitled to this. In addition to this the Subordinate Judge has allowed her an additional two annas, or ten annas in all, but as there is no cross appeal we need not consider whether this decision is correct.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

S. A. A. A.

(1) (1870) L. R. 5 Ch. App. 139.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

JANAKDHARI LAL

v.

GOSSAIN LAL BHAYA GAYWAL.*

1909

March 20

Certificate of Sale—Revenue Court, jurisdiction of—Public Demands Recovery Act (Beng. Act I of 1895) ss. 12, 15, 17, 24, 28—Sale by Collector, while deposit in treasury—Sale by Revenue Authorities without jurisdiction—Validity of sale against bona fide purchaser without notice—Whether civil suit lies to set aside sale—Speculative Purchaser—Hardship.

A certificate which has been properly made for arrears actually due can be cancelled or modified only on the ground that the amount stated was either never due, or, if due, had been paid before the certificate was made; and ss. 12 and 15 of the Public Demands Recovery Act do not apply when the sale is held without jurisdiction, the amount due under the certificate having been paid before the sale.

When the sale was held by the Revenue authorities without jurisdiction, it cannot be treated as one made under the provisions of the Public Demands Recovery Act, and may consequently be challenged by a civil suit without recourse to procedure provided by the Act.

Balkishen Das v. Simpson (1), *Baijnath Sahu v. Lala Sital Prasad* (2) and *Harkhoo Singh v. Bunsidhur Singh* (3) followed.

Where a sale has taken place on the basis of a satisfied judgment, the satisfaction of which has been certified to the Court, the sale is void and ineffectual to pass any title even to a *bona fide* purchaser for value without notice.

A Certificate Officer has authority to sell only so long as the certificate remains unpaid, and a duty is cast upon him by law to enter satisfaction as soon as payment has been made.

Rewa Mahton v. Ram Kishen Singh (4), *Mothura Mohun v. Akhoy Kumar* (5) and *Yellappa v. Ramchandra* (6) distinguished.

No case of hardship arises where a person with eyes open makes a speculative purchase of a valuable estate for a nominal price.

Baijnath v. Ramgut (7), affirmed by the Judicial Committee (8), followed.

* Appeal from Original Decree No. 506 of 1907, against the decree of Nistaran Banerjee, Subordinate Judge of Gaya, dated August 17, 1907.

(1) (1898) I. L. R. 25 Calc. 833.

(5) (1888) I. L. R. 15 Calc. 557.

(2) (1868) 2 B. L. R. 1 (F. B.);

(6) (1896) I. L. R. 21 Bom. 463.

10 W. R. 66 (F. B.).

(7) (1890) 5 C. L. J. 687.

(3) (1898) I. L. R. 25 Calc. 876.

(8) (1896) I. L. R. 23 Calc. 775.

(4) (1886) I. L. R. 14 Calc. 18;

L. R. 13 I. A. 106.

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APPEAL by Janakdhari Lal, the defendant No. 7.

The plaintiff, Mohant Gossain Lal Bhaya Gaywal, alleged that the cesses having become due from him in respect of Mouza Raghunathpur on account of March *kist* 1905, certificates were issued under the Public Demands Recovery Act; that he deposited the amount due under the certificate on the 28th July 1905, as also the cesses due for the June *kist* with interest, but the Collector notwithstanding the deposit sold the Mouza for the arrears of June *kist*. He thereupon brought this action for a declaration that the auction-sale of the Mouza held by the Collector under the Public Demands Recovery Act, on the 18th December 1905, was illegal and invalid, and for the possession of the property from the purchaser, Janakdhari Lal, on the ground that there being no arrears due, a valid certificate under the Act could not have been issued, and all proceedings based on such invalid certificates were void and inoperative.

The Subordinate Judge found that the certificate was, as a matter of fact, made not on the 28th July 1905, but on the 11th August 1905, on which date an entry was made in the order-sheet initiating the certificate proceedings, and there being no arrears due on the date on which the certificate was issued, he held that the Collector had no jurisdiction either to issue a certificate or to execute it; and he accordingly set aside the sale and made a decree in favor of the plaintiff.

Janakdhari Lal, thereupon, appealed to the High Court.

Babu Umakali Mukerjee (with him *Babu Kulwant Sahai*), for the appellants. Certificate on the record shows that it was made on the 11th August 1905. The sole remedy of plaintiff was under section 12 and failing that under section 15 of the Public Demands Recovery Act. When a sale has been held by a Collector under the Public Demands Recovery Act, although the amount due under the certificate has been previously deposited in the Treasury, the sale is null and void, even as against a *bona fide* purchaser for value without notice: *Rewa Mahton v. Ram Kishen Singh* (1) and *Mothura Mohun Ghose*

(1) (1886) I. L. R. 14 Calc. 18; L. R., 13 I. A. 106.

Mondal v. Akhoy Kumar Mitter (1) and *Yellappa v. Ramchandra* (2) cited. This was a case of great hardship of an innocent purchaser buying property from a purchaser at an execution sale.

Babu Prokash Chunder Sarkar, for the respondent, intimated to the Court that he had no instruction to appear in the matter.

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MOOKERJEE AND CARNDUFF JJ. The subject-matter of the litigation out of which the present appeal arises is Mouza Raghunathpur in the District of Gaya. The plaintiff-respondent commenced the action for declaration that the sale of the Mouza held by the Collector under the Public Demands Recovery Act, 1895, is a nullity, and for recovery of possession of the property from the purchaser. It appears that on the 26th July 1905 the Collector made a certificate for recovery of Rs. 15-1 as arrears of road-cess for the June *kist* of that year. The plaintiff deposited in the Treasury two days later the entire amount due. This fact, however, was overlooked, and a notice under section 10 of the Public Demands Recovery Act of 1895 was served on the 27th August on the basis of the certificate previously made. The property, which is now valued at Rs. 6,000, was sold on the 18th December following, and was purchased by Sheo Sahai Lal for Rs. 100. The sale was confirmed on the 20th February 1906, and the purchaser on the 28th June 1906 transferred the property for Rs. 500 to Janakdhari Lal. On the 2nd January 1907 the plaintiff commenced the present action for declaration of his title and for recovery of possession. He joined the Secretary of State for India in Council as the first defendant, Sheo Sahai Lal, the purchaser at the certificate sale as the second defendant, some mokurari-dars as the third, fourth, fifth and sixth defendants, and the transferee from the auction-purchaser as the seventh defendant. The claim was resisted by the seventh defendant alone, substantially on the ground that arrears of cesses were due,

(1) (1888) I. L. R. 15 Calc. 557.

(2) (1896) I. L. R. 21 Bom. 463.

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that the sale had been rightly held, and that in any event, it could not be set aside, as against a *bona fide* purchaser for value without notice. The Subordinate Judge in the Court below found that the certificate was as a matter of fact made, not on the 26th July 1905, but on the 11th August, on which date an entry was made in the order-sheet initiating the certificate proceedings. He concluded, therefore, that on the date on which the certificate was made there were no arrears due, and that, consequently, the Collector had no jurisdiction either to issue a certificate or to execute it. In this view, he set aside the sale and made a decree in favour of the plaintiff which entitled him to recover possession. The seventh defendant has now appealed to this Court, and, on his behalf, it has been contended, *first*, that the certificate was made on the 26th July 1905, and not on the 11th August, as held by the Subordinate Judge; *secondly*, that the only remedy of the plaintiff was by proceedings under sections 12 and 15 of the Public Demands Recovery Act; and, *thirdly*, that even if a regular suit is held to be maintainable, the plaintiff is not entitled to any relief on the ground that the sale took place on the basis of a satisfied certificate.

As regards the first ground taken on behalf of the appellant, we are satisfied that the view taken by the Subordinate Judge is erroneous. The copy of the certificate on the record shows that it was initialled by the certificate officer on the 26th July, and there is no foundation for the speculation of the Subordinate Judge that the entry of the date was subsequent to the actual making and signature of the certificate. It is perfectly true that the date is not entered in the space provided in the printed form for that purpose; nor is the amount due mentioned in the place where it ought to have been made. But these defects do not, by themselves, afford any basis for suspicion that the certificate was subsequently made and deliberately ante-dated. We must consequently hold that the certificate was made on the 26th July 1905.

The second ground taken on behalf of the appellant raises the question as to the remedies open to the plaintiff after the certificate had been made. It is argued on behalf of the

appellant that the sole remedy of the plaintiff was to file a petition of objection to the certificate under section 12 of the Public Demands Recovery Act, and if he was defeated on such an application, he might institute a suit in the Civil Court under section 15. In our opinion, there is no foundation for this contention. Section 12 contemplates a case in which an objection is taken that the judgment-debtor is not liable to pay the whole or any part of the amount for which the certificate has been made and filed against him. Section 13 provides that the certificate officer may set aside, modify or vary the certificate if the petitioner establishes his denial of liability. It is manifest that the procedure provided in section 12 is open only when the judgment-debtor is in a position to allege and prove that there were no arrears due from him at the time when the certificate was made, or that a smaller amount than the one in respect of which the certificate was made was due. Section 12 has no application when the judgment-debtor admits that the certificate was rightly made, but alleges that the amount of arrears has been subsequently paid. Section 15 has precisely the same scope, and entitles the judgment-debtor to maintain an action for cancellation or modification of the certificate. A certificate which has been properly made for arrears actually due cannot be cancelled or modified, because the demand has been subsequently satisfied. This, we think, is reasonably plain from section 17, sub-section (1), which provides that no certificate duly made shall be cancelled by a Civil Court, otherwise than on the ground that the amount stated in the certificate was actually paid or discharged before the making of such certificate, or that no part of the amount stated in the certificate was due by the judgment-debtor under the certificate. In other words, a certificate can be cancelled only on the ground that the amount stated was either never due, or, if due, had been paid before the certificate was made. Sections 12 and 15, therefore, have obviously no application to the circumstances of the present litigation, in which the contention of the plaintiff is, not that the certificate was improperly made, but that the sale was held without jurisdiction, because

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the amount due under the certificate had been paid before the sale was held. We must, therefore, overrule the objection of the appellant that the sole remedy of the plaintiff was by an application under section 12, or by a suit under section 15. In the view we take, neither of these courses was open to the plaintiff. It is, therefore, unnecessary to consider whether, if either of these courses had been open to the plaintiff, that could have been rightly treated as his exclusive remedy. The decision of their Lordships of the Judicial Committee in *Bal Kishen Das v. Simpson* (1), as also the earlier decisions of this Court in *Baijnath Sahu v. Lala Sital Prasad* (2) and *Harkhoo Singh v. Bunsidhur Singh* (3), tend to support the proposition that if circumstances are established which show that the sale has been held without jurisdiction, the sale cannot be rightly treated as one made under the provisions of the Act, and may consequently be challenged by a civil suit without recourse to the procedure provided in the Act; in other words, in a case of this description, as there is no foundation for the exercise of jurisdiction by the Revenue authority, the person injuriously affected is not deprived of his remedy by recourse to the ordinary law. As we have already indicated, however, in the case before us, the plaintiff was not entitled to proceed under either section 12 or 15 of the Public Demands Recovery Act. The second ground urged on behalf of the appellant cannot, therefore, be supported.

The third and last ground taken on behalf of the appellant raises a question of some nicety, namely whether, when a sale has been held by the Collector under the Public Demands Recovery Act, although the amount due under the certificate has been previously deposited in the Treasury, the sale is null and void, even as against a *bona fide* purchaser for value without notice. It has been strenuously contended by the learned vakil for the appellant that the sale cannot be set aside, and he has placed reliance upon the cases of *Rewa Mahton v. Ram*

(1) (1898) I. L. R. 25 Cal. 833.

(2) (1868) 2 B. L. R. 1 (F. B.);
 10 W. R. 66 (F. B.)

(3) (1898) I. L. R. 25 Cal. 876.

Kishen Singh (1), *Mothura Mohun v. Akhoy Kumar* (2) and *Yellappa v. Ram Chandra* (3). The substance of his argument is that as soon as the certificate has been properly made, the certificate has, upon the authority of the decision in *Purna Chandra v. Dina Bandhu* (4), the same force and effect, to all intents and purposes, as a final decree of a Civil Court, and that the purchaser in execution of a satisfied decree of a Civil Court is not liable to have the sale cancelled, if he is a *bona fide* purchaser for value without notice. This argument raises two questions of considerable importance, *viz.*, *first*, as to the precise effect of a sale in execution of a decree of a Civil Court which has been satisfied before the sale takes place, and, *secondly*, whether the rule applicable to sales in execution of decrees of a Civil Court governs in this matter sales under the Public Demands Recovery Act.

Now, so far as the first of these two questions is concerned, it is clear that the proposition for which the appellant contends is too broadly stated, and is not supported by the authorities upon which reliance is placed. It is perfectly true that so far as a sale in execution of a money decree is concerned, the reversal of the decree subsequent to the sale does not affect its validity, if the purchaser at the execution sale is a person other than the decree-holder himself. This principle was affirmed by Sir Barnes Peacock in *Jan Ali v. Jan Ali* (5), in the case of sales in execution of *ex-parte* decrees which are subsequently vacated and was then applied to cases of sales in execution of decrees which are subsequently reversed on appeal: *Zainulabdin v. Muhammad Asghar* (6), *Dorasami v. Annasami* (7), *Chandan v. Ramdeni* (8) and *Set Umed Mal v. Srinath Roy* (9). It has also been ruled that there is no real distinction in this respect between an auction-purchaser at a sale in execution

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(1) (1886) I. L. R. 14 Calc. 18 ;

L. R. 13 I. A. 106.

(2) (1888) I. L. R. 15 Calc. 557.

(3) (1896) I. L. R. 21 Bom. 463.

(4) (1907) I. L. R. 34 Calc. 811 ;

5 C. L. J. 696.

(5) (1868) 1 B. L. R. 56 A. C.

(6) (1887) L. R. 15 I. A. 12.

(7) (1899) I. L. R. 23 Mad. 306.

(8) (1904) I. L. R. 31 Calc. 499.

(9) (1900) I. L. R. 27 Calc. 810.

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of a money decree and an auction-purchaser at a sale in execution of a mortgage decree: *Mukhoda Dassi v. Gopal Chander Dutta* (1) and *Shivlal v. Shambhu Prasad* (2). The principle is based upon weighty reasons explained by Lord Redesdale in *Bennet v. Hamill* (3), in which that learned Judge pointed out that a purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that on that investigation, it has properly decreed a sale; see also *Bowen v. Evans* (4) where Sir Edward Sugden observed that it was of the greatest importance that sales made under the authority of the Court should not be lightly set aside. The principle in question was affirmed by the House of Lords in *Bowen v. Evans* (5) and *Tommey v. White* (6), and by the Supreme Court of the United States in *Beauregard v. New Orleans* (7) and *Grignon v. Astor* (8). We do not refer to these decisions as authorities in any way binding upon this Court, but simply as indicating that the doctrine that the reversal or modification of a judgment does not invalidate the sale, nor divest the title of the purchaser, is based upon the perfectly intelligible principle that a purchaser at a judicial sale is not compelled to go behind the judgment or decree and investigate the facts upon which it was rendered. The question, however, still remains, whether a sale in execution of a judgment which has been satisfied, in so far as a *bona fide* purchaser without notice is concerned, is entitled to be placed in the same category as a sale in execution of a decree which was in existence and full force at the time of the sale, but it subsequently reversed. It is manifest that upon principle there is a substantial difference between the two classes of cases. In the first class of cases, there is a subsisting judgment which it is the duty of the Court to execute, but which is subsequently set aside because made *ex parte* or reversed on appeal because erroneous on the

(1) (1899) 1 L. R. 26 Cal. 734

(2) (1905) 1 L. R. 29 Bom. 435.

(3) (1806) 2 Sch. & Lef. 506.

(4) (1844) 1 Jones & LaTouche,

178, 259.

(5) (1848) 2 H. L. C. 257.

(6) (1850) 3 H. L. C. 49.

(7) (1855) 18 Howard 497.

(8) (1844) 2 Howard 219.

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merits. In the second class of cases, there is not at the time of the sale an unsatisfied decree which it is the duty of the Court to execute. This fundamental distinction between the two classes of cases has led to considerable divergence of judicial opinion upon the matter. In the case of *Rewa Mahton v. Ram Kishen* (1), two persons A and B held cross decrees against each other. A, who held a decree for the smaller sum, took out execution, whereas under the law B alone ought to have taken out execution for the difference of the sums due under the decrees. Under these circumstances, their Lordships of the Judicial Committee held that, although the sale was irregular, the title of the execution purchaser, who was a stranger to the proceedings, was not affected. Their Lordships went on to observe as follows: "A purchaser under the sale in execution is not bound to enquire whether the judgment-debtor had a cross-judgment of higher amount, any more than he would be bound in an ordinary case to enquire whether a judgment upon which an execution issues has been satisfied or not. These are questions to be determined by the Court issuing the execution. To hold that the purchaser at a sale in execution is bound to enquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction, a purchaser is no more bound to enquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues." No doubt, the principle thus enunciated, taken apart from the circumstances of the case in which the rule was laid down, may be treated as of the widest possible application, but it must not be overlooked that in an earlier part of the judgment, their Lordships had pointed out that both the cross-decrees had not been brought before the Court for execution, and consequently there was nothing to prevent A, the holder of the decree for the smaller sum, from taking out execution of his decree under section 246 of the Code of Civil Procedure of 1877. The Court, therefore, had ample jurisdiction

(1) (1886) I. L. R. 14 Calc. 18.

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to execute the decree at the instance of A, and if the Court had jurisdiction, no question could arise as to the propriety of the sale. The observations of the Judicial Committee, however, have been treated in subsequent cases as capable of general application. Thus in *Mothura Mohun v. Akhoy Kumar* (1) and *Yellappa v. Ram Chandra* (2), it was ruled that where a person, a stranger to the proceedings, purchases property *bona fide* at an execution sale, his purchase cannot be invalidated on the ground that the decree had already been satisfied out of Court at the time the sale was held. This decision may be justified on the ground that as satisfaction had not been certified to the Court, the decree remained, so far as the Court was concerned, an unsatisfied decree capable of execution, and the Court had consequently jurisdiction to execute it. The cases relied on by the learned vakil for the appellant do not, therefore, support the broad contention that when a sale takes place in execution of a decree which has been satisfied and the property of the judgment-debtor passes into the hands of a *bona fide* purchaser for value without notice, the sale cannot under any circumstances be set aside. The cases relied upon are at best authorities for the proposition that the sale cannot be set aside, if the satisfaction of the decree has not been certified to the Court; but even upon this point, there has been some divergence of judicial opinion. For instance, in the case of *Patdasi v. Sharup Chand Mala* (3), it appears to have been assumed as obvious that as the decree in execution of which the sale took place had been satisfied before the sale, the purchaser, though a stranger to the proceedings, did not acquire any valid title [see also *Ram Gopal v. Rajan* (4)]. Again, the decision of their Lordships of the Judicial Committee in *Ganga Pershad Sahu v. Gopal Singh* (5) may lend some apparent support to this view. In that case the decree-holder and judgment-debtor had agreed to a postponement of the sale, but the joint petition of the parties was by an error presented to the

(1) (1888) I. L. R. 15 Calc. 557.

(2) (1896) I. L. R. 21 Bom. 463.

(3) (1887) I. L. R. 14 Calc. 376.

(4) (1907) 6 C. L. J. 43.

(5) (1884) I. L. R. 11 Calc. 136;

L. R. 11 I. A. 234.

wrong Court, with the result that the sale took place. This Court set aside the sale on the authority of *Rajmohun v. Gour Mohan* (1), and this decision was subsequently affirmed in appeal by the Judicial Committee. No doubt, in that case, the decree-holder himself was the purchaser, but no reference is made to this circumstance as the foundation of the judgment. In any event, it is clear that there is no authority in our Courts in support of the proposition that when a decree has been satisfied, and the satisfaction has been certified to the Court, a sale held in execution of the satisfied decree passes to the purchaser an indefeasible title, because he is a stranger to the proceedings. The nearest case in the English Courts is the decision of Lord Hardwicke in *Jeanes v. Wilkins* (2). In that case, a creditor had the body of his debtor seized in execution under a "*capias ad satisfaciendum*"; during the continuance thereof, the sheriff sued out a writ of *feri facias* and levied on a leasehold of 99 years. The question arose, whether the sale could be avoided, on the ground that during the existence of the *capias ad satisfaciendum* and the person in custody, a *feri facias* ought not to have been taken out. Lord Hardwicke ruled that the *feri facias* could not be treated as void, that although it was irregular, it was sufficient to indemnify the sheriff, so that he might justify in an action of trespass, and that consequently the purchaser under the sheriff gained a good title, notwithstanding the writ might be afterwards set aside. This is an express authority in favour of the view that when a sheriff holds a sale without notice that the defendant in execution was then in custody on a *capias ad satisfaciendum*, the sale passes a good title to a stranger purchaser. If, therefore, there is no difference between a satisfaction of a judgment in fact by the payment of money and a satisfaction in law by taking the defendant in custody on a *capias ad satisfaciendum*, it follows that a sale held on the basis of a satisfied judgment when the satisfaction has not been certified to the Court, is not void. The question has also been much debated in the American Courts, and the

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(1) (1859) 8 M. L. A. 91.

(2) (1749) 1 Ves. Sen. 195.

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preponderance of authority there is in favour of the view that a sale under a satisfied judgment is void, even though such satisfaction has not been notified to the Court, and the property has passed into the hands of an innocent purchaser. The leading decisions on the point will be found collected in Kleber on Void Judicial and Execution Sales, sections 262, 263 and 289; Freeman on Judgments, section 480; Freeman on Execution, sections 19 and 20; and Freeman on Void Judicial Sales, section 7A and section 23, note 4; where it is pointed out that a sale under a satisfied judgment is affirmed to be void in *Wood v. Colvin* (1), *Doe v. Ingersoll* (2) and *Murrell v. Roberts* (3), whereas such a sale is upheld in favour of innocent purchasers in *Boren v. McGeehee* (4), *Van Campen v. Snyder* (5), *Hoffman v. Strohecker* (6) and *Reed v. Austin* (7). The ground in support of the view that the sale on the basis of a satisfied judgment is void is thus put in *Craft v. Merrill* (8). "The judgment was the sole foundation of the sheriff's power to sell and convey the premises, and if the judgment was paid when he undertook to sell and convey, his power was at an end, and all his acts were without authority and void; the purchaser under a power is chargeable with notice, if the power does not exist, and purchases at his peril." In another case where after full satisfaction of a decree by a sale of part of the property of the judgment-debtor, execution was again taken out and a sale held, *Durette v. Briggs* (9), the Court observed:—"When an execution has performed its office by extracting full satisfaction from a portion of the debtor's property, it cannot have sufficient life and vigour to deprive him of the residue and transfer the title from him to another." The ground in support of the contrary view that a sale on the basis of a satisfied judgment cannot be

(1) (1842) 2 Hill 566; 38 Am. Dec. 598.

(2) (1848) 11 S. & M. 249; 49 Am. Dec. 57.

(3) (1850) 11 Ired. 424; 53 Am. Dec. 449.

(4) (1837) 6 Port. 432; 31 Am. Dec. 695.

(5) (1838) 3 How. 66; 32 Am. Dec. 311.

(6) (1838) 7 Watts 86; 32 Am. Dec. 740.

(7) (1846) 9 Missouri 722; 45 Am. Dec. 336.

(8) (1853) 14 N. Y. 456.

(9) (1871) 47 Missouri 361.

set aside as against a purchaser for value without notice is thus emphatically put in *Mason v. Vance* (1): "An execution, regular on its face, based upon a judgment equally regular and apparently in full force, must be regarded as a regular execution; that, while a regular execution may be voidable, it cannot be void; that it must operate as a sufficient justification to officers entrusted with its execution; and finally, that it cannot be the means of ensnaring innocent purchasers when nothing exists to warn them that the foundation on which it apparently rests has in fact been swept away." But amidst this diversity of judicial opinion, there is unanimity upon one point, namely, that when a sale has taken place on the basis of a satisfied judgment, the satisfaction of which has been certified to the Court, the sale is void and ineffectual to pass any title even to a *bona fide* purchaser for value without notice. This proposition is sufficient for the determination of the rights of the parties in the case now before the Court.

But the second question, which calls for decision, is whether these principles are applicable to cases of sales under the Public Demands Recovery Act. Here the form of the notice prescribed by the Act to be issued to the judgment-debtor under section 10 expressly states that the certificate is to be executed, unless the amount is paid into the office of the Collector. Section 26 of the Act further provides that, in the event of payment, the certificate officer shall cause satisfaction to be entered upon the certificate, as also in the Register of Certificates kept under section 24. From these statutory provisions, it is manifest that the certificate officer has authority to sell only so long as the certificate remains unpaid, and that a duty is cast upon him by the law to enter satisfaction as soon as payment has been made. In these circumstances, can it be contended upon any intelligible principle that a sale may be upheld as valid, though it has been held in execution of a certificate which has been duly satisfied? In our opinion, such a view cannot possibly be supported. The

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Secretary of State is the decree-holder under the Act, and the Collector is authorised to execute the certificate on his behalf. If a payment is made into the Treasury sufficient to satisfy the demand, it is difficult to appreciate upon what principle it can be seriously contended that the sale is merely irregular and not void because held entirely without statutory authority. In this view, we are supported by the decision of this Court in *Gujraj Sahai v. Secretary of State* (1), where Mr. Justice Pigot ruled, on the authority of the cases of *Abdul Haya v. Nawab Raj* (2) and *Mohan Ram v. Baboo Shib Dutt* (3), that a sale in execution of a satisfied certificate is absolutely void. When the matter was taken on appeal before the Judicial Committee [*Abdul Hai v. Gujraj Sahai* (4)], this view was expressly affirmed. Their Lordships observed as follows :—"Upon the arrear being paid into the Treasury, it becomes the statutory duty of the Collector, to enter satisfaction upon the certificate, under his hand and signature which he failed to do. The appellant argued that there being no such entry upon the certificate, his purchase of that date was valid. It would be a singular result if a Collector's neglect of his statutory duty gave him statutory power to sell in execution the property of a person who owed nothing to the Government. That such was not the intention of the Legislature is abundantly clear. By the terms of the notice served upon the judgment-debtor, along with a copy of the certificate all that the debtor is required to do in order to prevent execution of the certificate, is to pay the amount of arrears demanded into the office of the Collector." These observations upon the provisions of the Public Demands Recovery Act of 1880 are, in our opinion, equally applicable to the Act of 1895. The third ground taken on behalf of the appellant must consequently be overruled.

The learned vakil for the appellant finally argued that this was a case of great hardship on his client—a purchaser from an innocent purchaser at a Government sale. With reference

(1) (1889) I. L. R. 17 Calc. 414.

(3) (1871) 8 B. L. R. 230, 235.

(2) (1868) B. L. R. Sup. Vol. 911.

(4) (1893) I. L. R. 20 Calc. 826;

L. R. 20 I. A. 70.

to this argument, it is sufficient to refer to the weighty observations of Mr. Justice Pigot in his judgment in the case of *Baijnath v. Ramgat* (1), which was subsequently affirmed by their Lordships of the Judicial Committee [*Baijnath Sahai v. Ramgut Singh* (2)]: "If considerations of hardship could affect our decision, we should still say there were none in this case. The defendant with his eyes open made a speculative purchase of a valuable estate for next to nothing, getting it at that price, as we have no doubt, because no one would buy at a sale surrounded with circumstances of such a doubtful character. If he had succeeded, as he very nearly did, he would have made a very good thing indeed. He ran the chance of some loss or enormous profit. He must abide by the result."

The result, therefore, is that the decree of the Court below must be affirmed, and this appeal dismissed. There will be no order for costs as the learned vakil for the respondent intimated to the Court that he had no instructions to defend the appeal.

Appeal dismissed.

S. A. A. A.

(1) (1890) 5 C. L. J. 687.

(2) (1896) I. L. R. 23 Calc. 775.

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CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Chatterjee.

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v.

EMPEROR.*

Penal Code (Act XLV of 1860) s. 186—Voluntarily obstructing Public Servants in the discharge of their public functions—Releasing property attached by Civil Court peons under distress warrants issued under the Public Demands Recovery Act (Beng. I of 1895) and the Village Chaukidari Act (Beng. VI of 1870) s. 45—Legality of Warrant—Omission to specify date of extension on the face of it—Civil Procedure Code (Act V of 1908) Order XXI, Rule 24 (2)—Execution by person not named in the warrant—Delegation of powers by Nazir.

A distress warrant issued under the Public Demands Recovery Act which has been extended beyond the original date of return, but does not bear on the face of it the altered date, is not a legal warrant under Order XXI, rule 24 (2) of the Civil Procedure Code.

A warrant under section 45 of the Village Chaukidari Act must contain the name of the person charged with the execution thereof, and cannot be legally executed by any other person delegated by the former for that purpose.

Where the accused released certain buffaloes attached by the Civil Court peons, on the 2nd August, under two warrants addressed to the nazir, but endorsed by him to them, the one issued under the Public Demands Recovery Act, which was originally returnable by the 26th July but had been extended to the 8th August, without the alteration of the date appearing thereon, and the other under section 45 of the Village Chaukidari Act directed to the nazir but without naming any person therein as charged with the execution of it:—

Held, that they were not guilty of an offence under section 186 of the Penal Code, as the peons were not lawfully executing the warrants.

A WARRANT was issued on the 29th June 1909 by Moulvi Abdus Samad, Deputy Collector and Magistrate of Gaya, acting as a Certificate Officer, under the Public Demands Recovery Act (Bengal I of 1895), for the realization of arrears of cesses by the attachment of the moveables of one Jumlo Bibi and others. It was originally made returnable by the 26th July, but it appeared from an order recorded in the order sheet that the Certificate Officer had, on the application of the nazir to

* Criminal Revision No. 1264 of 1909, against the order of R. S. Green-shields, District Magistrate of Gaya, dated Oct. 12, 1909.

whom it was addressed for execution, on the 23rd July, extended the date of return to the 8th August. The warrant, however, did not contain on the face of it the altered date, and there was nothing to show that the accused knew of the extension. A second warrant was issued by the same Officer as a Magistrate under section 45 of the Village Chaukidari Act (Beng. VI of 1870), returnable on the 12th August, for realization of chaukidari salaries by attachment of the moveables of Durga Lal, *sir-panch*, in the first instance, and then of Abdul Aziz Khan and other *panches*. Both the warrants were sent to the same nazir for execution, but he endorsed them to certain Civil Court peons by name. The name of the person charged with the execution of the warrant under the Chaukidari Act was not, however, specified therein. The peons went with the warrants to the village of Jumlo Bibi and Abdul Aziz and attached certain buffaloes belonging to them on the 2nd August. The petitioners, who were the *gomasta* and *barahil* of the debtors, thereupon went up to the peons, as they were removing the buffaloes, and released them.

They were tried and convicted by Babu G. K. Ghosh Chowdhry, Second Class Magistrate of Gaya, under section 186 of the Penal Code, and sentenced, on the 6th October, to four months' rigorous imprisonment and to fines of Rs. 50 each. An appeal from the said conviction and sentence was dismissed on the 12th by the District Magistrate who, however, reduced the sentences.

The petitioners then obtained a Rule from the High Court to set aside the proceedings on the grounds that the resistance to the execution was after the date specified in the first warrant, and that the resistance, if any, in respect of the second warrant was not to the person named therein as charged with its execution.

Mr. Ahmad (with him *Moulvi Mahomed Karim*), for the petitioners. The first warrant was time-expired on the face of it. It was, no doubt, extended to the 8th August, but the extended date was not mentioned in it. Refers to the Civil Procedure Code, section 148, and Order XXI, rule 24 (2). As to the

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second warrant, section 45 of the Village Chaukidari Act requires execution of it by the person named therein and does not permit delegation to others.

Mr. Monnier, for the Crown. The first warrant was a live warrant on the date of its execution, though the alteration and extension of the date of return did not appear on the face of it. The peons were, therefore, *in fact* acting in the lawful discharge of their public functions. In *Anand Lall Bera v. Empress* (1) the warrant had actually expired when it was put in execution. In *Abinash Chandra Aditya v. Ananda Chandra Pal* (2) the date of return of the warrant had been extended, but it is expressly mentioned in the judgment that notice of the later date was not given to the officer in charge of its execution. This case is, therefore, also distinguishable, as in the present instance the extension was made on the application of the same nazir to whom it was directed for execution. The nazir could himself have executed the warrant, and his knowledge of the fact of extension would in law be the knowledge of the peons to whom he had lawfully endorsed the warrant. The omission of the altered date in the warrant itself might be irregular under Order XXI, rule 24 (2), but it would not render a warrant, which was actually in force, time expired, or invalidate it so as to affect the culpability of the accused under section 186 of the Penal Code, inasmuch as the object of the warrant is only to inform the judgment-debtor of the decretal amount and costs : *Emperor v. Ganeshi Lal* (3) and *Empress v. Amar Nath* (4). The judgment-debtor is only concerned with the amount of his liability and not with the authority of the process server. As to the other warrant, it is true that section 45 of the Village Chaukidari Act requires the name of the person entrusted with its execution to be mentioned, but a nazir has always been recognized as the proper officer for the execution of processes in the mofussil in India, and his power of delegation of his functions in this respect to peons, by endorsement on the warrant, dates from

(1) (1883) I. L. R. 10 Cal. 18.

(3) (1904) I. L. R. 27 All. 258, 259.

(2) (1904) I. L. R. 31 Cal. 424, 426.

(4) (1883) I. L. R. 5 All. 318.

1793: *Dharam Chand Lal v. Queen-Empress* (1), followed in *Sheo Proqash Tewari v. Bhoop Narain Prosad Pathak* (2). The Legislature in enacting section 45 must be taken to have contemplated this power of delegation in the case of a nazir. This section was not intended to deprive him of his general powers in this respect, and must be read consistently with the same. Besides, it would be impossible in many cases for the nazir to execute personally all warrants addressed to him under the section. Under the English Law a person whose property is seized is entitled to know the authority under which it is done, but the matter is not to be decided in accordance with English Law and precedents: *Dharam Chand Lal v. Queen-Empress* (1).

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HARINGTON AND CHATTERJEE JJ. This is a Rule calling upon the District Magistrate to show cause why the conviction and sentence mentioned in the petition should not be set aside or such other order passed, as the circumstances may require, on the ground that the resistance was after the date specified in the first process, and on the further ground that the resistance, if any, in respect of the second process, was not to the person named therein as charged with the execution of the process.

The petitioners have been convicted under section 186 of the Indian Penal Code. They appealed to the District Magistrate, and the sentence passed on them was reduced to one month's rigorous imprisonment. They now ask that the conviction may be set aside on the grounds upon which the Rule was granted.

Now, the resistance was made to the execution of two different warrants, one under the Public Demands Recovery Act and the other under the Chaukidari Act. With respect to the former warrant, the ground taken by the petitioners is that, whereas it appears on the face of it that the returnable date of the warrant was July 26th, the resistance was not in fact

(1) (1895) I. L. R. 22 Calc. 596, 605, 607. (2). (1895) I. L. R. 22 Calc. 759.

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offered by the prisoners until August 2nd. It is urged on behalf of the petitioners that, as the warrant could only be executed on or before the 26th July, there was nothing illegal in resisting its execution when the time during which it could lawfully be executed had expired. The reply made by the Crown is that in fact the warrant had been extended until August 8th. Therefore the resistance was unlawful, because the warrant could be lawfully executed on August 2nd. Order XXI, rule 24, contains the provision as to what must appear on the process for execution, and, amongst other things, it is provided that in every such process the day shall be specified on or before which it shall be executed. It was, therefore, material that the warrant should bear a date on or before which it could be executed. Now, assuming that this warrant had been extended to August 8th, that date did not appear on the warrant. Therefore the warrant failed in an essential particular, and was at the time of the resistance, on the face of it, not a good warrant. That being so, we think the prisoners could not be convicted of voluntarily obstructing a public servant in the discharge of his public functions, because the discharge of the public function was the execution of a warrant, and the warrant at the time failed to show that it could be executed at the time when the resistance was offered to the public servant.

Further, in our view, the persons against whom the warrant was sought to be executed were entitled to see the warrant not only for the purpose of satisfying themselves as to the amount, but also for the purpose of satisfying themselves that the person who sought to execute the warrant against them was legally authorized so to do. When the warrant on the face of it did not confer that authority to the person who sought to execute it, we cannot see how the persons who resisted the execution can be convicted under section 186.

Then with regard to the second point the question is perhaps one of greater nicety. The warrant was issued under section 45 of the Chauthdari Act. The point taken is that under that section the person who is to execute a warrant

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must be named in it, and the warrant could only be executed by the person so named. In this case the warrant did not specify the name of the person who was to execute it, and it was not executed by the person to whom it was directed. In answer it is contended for the Crown that the warrant was directed to the naib-nazir, and he, by the practice, which has obtained for many years in this country, had general power to delegate the execution of processes to his subordinates. Therefore the warrant which was executed by a peon subordinate to the naib-nazir was being lawfully executed when the petitioner resisted the execution.

The words of section 45 of the Chaukidari Act run as follows, with regard to the particular issue of the warrant: "The District Magistrate may issue his warrant for the realization of the chaukidar's pay from the members of the panchayat by distress and sale of their moveable property, and shall therein charge some person, therein named, with the execution thereof; and upon such warrant such proceedings shall be had as herein-before directed to be had on any writing issued for the recovery of any arrears of the tax by this Act directed to be levied."

Now, on the best consideration that we can give to the words of that section, we are of opinion that the warrant issued under that section must contain the name of the person who is to execute it, and that only the person who is named in the warrant as charged with execution can lawfully execute the warrant. The words in our view are sufficiently stringent to override any general power of delegation which a naib-nazir might have in cases in which his power has not been specifically limited by statute.

For these reasons, we think the petitioners could not be convicted under section 186 of resisting a peon in the execution of the warrant issued under section 45 of the Chaukidari Act. The result is, that the Rule must be made absolute, the conviction and sentence set aside, and the petitioners, if on bail, must be directed to be released from their recognizances.

E. H. M.

Rule absolute.

FULL BENCH.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice. Mr. Justice Stephen,
Mr. Justice Mookerjee. Mr. Justice Coxe and Mr. Justice Chatterjee.*

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Hindu Law—"Relinquishment in favour of a sentient person"—Bequest for establishment of an image and worship of a Hindu deity.

The principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, nor does it make such a bequest void.

Upendra Lal Boral v. Hem Chundra Boral (1), *Rojomoyee Dassee v. Troy-lukho Mohiney Dassee* (2) and *Nogendra-Nandini Dassi v. Benoy Krishna Deb* (3) overruled so far as they conflict with the view of this Full Bench.

THE reference to Full Bench by Mitra and Bell JJ. was as follows:—

Mitra J. There is now no doubt as to the facts. Umesh Chandra Lahiri died on the 28th of June 1890, having made his last will on the 26th June 1890. He left him surviving his widow Braja Kumaree, his mother Anandamayee, a sister Iswamba and a cousin-sister Bhagabatee. They are now dead. Braja Kumaree died on the 27th of January 1894. Her husband had, by his will, given her authority to adopt three sons in succession, one in default of the other, but she did not exercise her authority. The seventh defendant, Hem Chandra Lahiri, is now admittedly the testator's heir-at-law, if the true construction of his will leads to a conclusion of intestacy after the widow's and mother's death. The plaintiffs are the sons of the testator's *guru* (spiritual preceptor) Harinath Bhattacharya, who died either in December 1892 or January 1893, *i.e.*, about a year before the widow's death.

One of the provisions made by the testator in this will was that, if at the death of his widow no son or adopted son existed capable of taking his property, the executors named in his will would establish an image of the goddess Kalee in the name of his mother Anandamayee, and the surplus income left after the worships of the family deities, Iswar Gopal Dev, Saligram Narain and Iswar Mahadev, should be devoted to the worship of the goddess to be called Anandamoyee Kalee. In accordance with this direction, the executors established and consecrated in the month of October or November 1894, an

* Reference to Full Bench in Appeal from Original Decree. No. 25 of 1906.

(1) (1897) I. L. R. 25 Calc. 405. (2) (1901) I. L. R. 29 Calc. 260.

(3) (1902) I. L. R. 30 Calc. 521.

image of the goddess made of earth, and later on, in the year 1899, replaced the image by one made of stone and had a temple built for its location. They thus carried out the directions in the will, and the worship has ever since been duly carried on.

The testator, however, added a direction in his will that "if, for any reason, the image of Iswar Kallee Devi is not established and if the income of my properties is not used for her *sheba* and worship, then my *gurudev* and his sons, grandsons, etc., in succession shall get my Rangpur properties and possess the same, in absolute right from generation to generation with right to sell or make a gift thereof." A similar provision was made with respect to some other properties in favour of the testator's *purshit* (priest).

The present suit was instituted by the sons of the *guru* on the 4th July 1904, for a construction of the testator's will, for a declaration that the trust for the establishment and consecration of the image of the Goddess Kallee and her worship was void for possession of the Rangpur properties and for an account and mesne profits. Some of the defendants are the surviving executors and trustees. The defendant Sarat Chandra Maitra was entitled to an annuity under the will. Hem Chandra Lahiri and the legal representatives of some of the deceased executors and trustees are also parties to the suit. The suit was defended by the surviving executors and trustees.

On the question of the validity or otherwise of the bequest relating to the Goddess Kallee, the lower Court was of opinion it was valid, and it accordingly dismissed the suit. The plaintiffs have appealed from the decision of the lower Court, and the first and the most important question raised for our consideration refers to the validity of this bequest. The question is one of some difficulty as it involves the consideration of the wider question. Does the text or phrase "relinquishment in favour of the donee who is a sentient person" in Chapter I, paragraph 21 of the *Dayabhaga* of Jimutavahana, the text which is the foundation of the doctrine of Hindu law that a gift to an unborn is invalid, render a bequest for a religious purpose invalid, when the physical manifestation of the Hindu deity for whose worship the bequest is made was not in existence at the time of the testator's death?

In the *Tagore case* (1), the Judicial Committee of the Privy Council was dealing with the case of gifts to human beings, and applying the rule laid down in *Dayabhaga*, Chapter I, paragraph 21, their Lordships came to the conclusion that in order to make a gift under a will valid, the donee, except in the case of an adopted child or a child *en ventre sa mere*, must be a person in existence capable of taking at the time the gift takes effect. The reason for the exception in favour of child in embryo, as given by Willes J., who delivered the judgment of the Judicial Committee, was that by a rule generally adopted in jurisprudence, children in embryo who afterwards come into separate existence are included in the class of sentient beings. The reason given for the inclusion of an adopted son was that, in contemplation of Hindu law, such a child is begotten by the father on behalf of whom he is adopted and is by a fiction of law supposed to be in embryo at the time of the death of the person who has given an

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authority to adopt either by a deed of adoption, or by a will. A Hindu deity is, in the contemplation of Hindus, always in existence; the establishment and consecration of a visible image is merely a physical manifestation. The idea of the birth of any of the deities of the Hindu pantheon at the present age or of any deity being *non-sentient* is utterly opposed to the Hindu *shastras* and Hindu religious notions. I do not, therefore, see why a gift to a Hindu deity should not be an exception in the same way as to a child in embryo or an adopted son.

Bequests for charitable purposes, such as bequests for feeding the poor, for the establishment and maintenance of schools, and for medical help to the sick, are much of the same character. The exact objects of charity are not ascertainable at the time of the testator's death and the objects themselves must always be fluctuating. Trustees hold property for charitable purposes. The objects of charity, though not definitely ascertainable at any time, are always in existence, and bequests for charitable purposes have always been held to be valid.

In *Upendra Lal Boral v. Hem Chundra Boral* (1), however, a bequest or dedication of property to a Hindu deity whose image was to be established and consecrated after the death of the testator by his executors or trustees was declared to be void. The learned Judges who decided the case were of opinion, that although there could be no doubt that the deity was always in existence, there could be no deity as such capable of accepting gifts until the deity was personified and they relied on the *Tagore case* (2) and *Bai Motirahu v. Bai Mamubai* (3). Neither of these cases, however, refers directly to gifts to deities. The decision in *Upendra Lal Boral v. Hem Chandra Boral* (1) was followed by Stanley J. in *Rajomoyee Dassee v. Troylukho Mohiney Dassee* (4) and by Stephen J. in *Nogendra-Nandini Dass v. Benoy Krishna Deb* (5), and in *Promotha Nath Roy v. Nagendrabala Chaudhrani* (6), the learned Judges (Caspersz and Coxe JJ.) were inclined to follow these decisions.

A different view, however, appears to have been taken by Sale J. in *Prafulla Chunder Mullick v. Jogendra Nath Sreemany* (7). It was held in that case that a bequest of property to trustees for the performance of the worship of deities to be established and consecrated periodically was valid. In a large number of cases cited before us, the validity of bequests for the performance of worships after the periodical establishment and consecration of images of deities such as Durga and Kalee and for the construction of temples and establishment of images was not questioned, and Sale J. had himself followed the practice without question in a previous case: *Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen* (8). The validity of bequests for the performance of periodical worships of deities like Durga, Kalee, etc., has in fact never been questioned, though it is well known that their worships are performed, after

(1) (1897) I. L. R. 25 Calc. 405.

(2) (1872) 9 B. L. R. 377; L. R.
 I. A. Sup. Vol. 47.

(3) (1897) I. L. R. 21 Bom. 709;
 L. R. 24 I. A. 93.

(4) (1901) I. L. R. 29 Calc. 260.

(5) (1902) I. L. R. 30 Calc. 521.

(6) (1908) 12 C. W. N. 808.

(7) (1905) 9 C. W. N. 528.

(8) (1897) I. L. R. Calc. 25, 112.

images are made and consecrated. I do not see my way to make any distinction in principle between an image of a deity to be permanently established and an image to be established and consecrated and worshipped for a time and then submerged in water.

An image of a deity may be broken or destroyed, and it is often necessary to replace it by another image and then to consecrate it. Notwithstanding the establishment of a new image, the essence of the deity which in contemplation of law is a juristical person in eternal existence is supposed to be the same as it was in the old image. It will be difficult to hold at the present day that on the mutilation or destruction of an image, an endowment lapses. A change in physical manifestation does not destroy the personality of a Hindu deity, neither does the establishment and consecration of an image bring, in the contemplation of Hindu *shastras*, a juristical person into fresh existence capable of accepting a gift.

As a matter of fact, no Hindu deity is supposed, except by a fiction, to actually accept or enjoy the benefits arising out of use of property, in the sense that these words may be used with respect to human beings. A gift to a deity is in substance a gift for charity, for the use generally of Brahmans or a particular Brahman or his family, and the idea attached to such a gift is a charitable use coupled with spiritual benefit to the donor. An image is supposed to be necessary for worship, as the conception by man of a deity without a physical representation is psychologically impossible.

The correctness of the decision in *Upendra Lal Boral v. Hem Chundra Boral* (1), which has been followed in some of the later cases, has been questioned before us. There is also a want of harmony in the reported cases as to the application of the principle on which a gift to an unborn has been declared to be invalid. I have also grave doubts as to the correctness of the proposition of Hindu law laid down in *Upendra Lal Boral v. Hem Chundra Boral* (1) and followed in the later cases. I, therefore, refer the following questions for decision by a Full Bench:—

- (i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void?
- (ii) Whether the cases of *Upendra Lal Boral v. Hem Chundra Boral* (1), *Rojomoyce Dassee v. Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dass v. Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

Bell J. I concur in the statement of the acts of the present case made by Mr. Justice Mitra, and I agree with him that the question of law set out by him should be referred to a Full Bench for decision.

- (1) (1897) I. L. R. 25 Calc. 405. (2) (1901) I. L. R. 29 Calc. 260.
(3) (1902) I. L. R. 30 Calc. 521.

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Mr. H. D. Bose (with him *Babu Manmathanath Mukherji* and *Babu Ramakanta Bhattacharya*), for the appellants. The testator himself contemplated that the worship was to be to a *Thakur* after establishment. It was not done in his lifetime.

[JENKINS C.J. *Attorney-General v. Pearson* (1), an English case, is very much similar to this.]

But it is held in this country in *Sibchunder Mullick v. Treepoorah Soondry Dossee* (2) that a gift to Kalee or Durga without any *bigraha* is bad.

[JENKINS C.J. The decision is vague, and I doubt whether that case would be accepted as a correct exposition of law.]

A gift to a *Thakur* is not necessarily a gift for charity, nor is a gift for the worship of a deity so.

[JENKINS C.J. Every gift for religious purpose is a gift for charity.]

But the gift is only to the image.

[JENKINS C.J. But to succeed you must establish: (i) that gift for worship is bad; (ii) that gift to an image is so connected with worship that they cannot be separated, the one from the other, and is therefore also bad.]

According to Hindu ideas, you cannot worship a deity except in the form of an image. In this case the dedication of the surplus income to Kalee is so connected with the establishment of the image that you cannot give effect to the gift without the establishment and consecration of the image. The image is in the eye of law a juristic person, and not the deity: *Doorga Proshad Dass v. Sheo Proshad Pandah* (3) and *Vidyapurna Tirtha Swami v. Vidyamidhi Tirtha Swami* (4). The case of *Upendra Lal Boral v. Hem Chundra Boral* (5) is on all fours with this case and should be followed.

Babu Golap Chandra Sarkar (with him *Babu Mahinimohan Chakravarti* and *Babu Shub Chandra Palit*), for the respondents. It is only in the ideal sense that property vests in

(1) (1817) 3 Mer. 353.

(3) (1880) 7 C.L. R. 278.

(2) (1842) 1 Fulton 98.

(4) (1904) I. L. R. 27 Mad. 435.

(5) (1897) I. L. R. 25 Cal. 405.

the deity: *Shibessouree Debia v. Mothooranath Acharjo* (1), *Prosunno Kumari Debya v. Golap Chand Baboo* (2) and *Jagadindra Nath Roy v. Hemanta Kumari Debi* (3). The property is practically held by the trustee. A deity or image cannot have the right of ownership: see Manu, Chapter XI, v. 26, and Medhatithi's Commentary on it. No Hindu professes to give to God. He only dedicates to the worship of God: see Raghunandan's '*Prana Pratistha*' quoted in Sarkar's Hindu law, 3rd Edition, page 420. The image is only the means of worship. The testator distinguishes between Kalee and image of Kalee. There is no gift to the God or the image. Then the question is who is to accept the gift? Does the consecrated image or the deity accept the gift? No, the idea is repugnant to the Hindu mind that a God enjoys a property. Gods are not benefited by dedication. Secular benefit is derived by learned Brahmans; the donor enjoys spiritual benefit. The law against perpetuity does not apply to gifts for religious and charitable purposes: see Act IV of 1882, section 17. On principle there cannot be any difference between periodic worships (e.g., Durga Puja, etc.) and permanent *sheba*. All such gifts are valid: *Ramtonoo Mullick v. Ram Gopal Mullick* (4), *Ashutosh Dutt v. Doorga Churn Chatterjee* (5), *Gokool Nath Guha v. Issur Lochun Roy* (6), *Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen* (7), the same case on appeal in *Bisseswar Prasanna Sen v. Bhagabati Prasanna Sen* (8), *Rojomoyee Dassee v. Troylukho Mohiney Dassee* (9) which is not quite in my favour, *Parbati Bibee v. Ram Barun Upadhya* (10) and *Prafulla Chunder Mullick v. Jogendra Nath Sreemany* (11). The question in this appeal was not exactly raised in most of the cases cited.

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| (1) (1869) 13 Moo. I. A. 270;
13 W. R. P. C. 18. | (5) (1879) I. L. R. 5 Calc. 438, 442. |
| (2) (1875) 14 B. L. R. 450;
23 W. R. 253; L. R. 2 I. A. 145. | (6) (1886) I. L. R. 14 Calc. 222, 223. |
| (3) (1904) I. L. R. 32 Calc. 129;
L. R. 31 I. A. 203. | (7) (1897) I. L. R. 25 Calc. 112, 124. |
| (4) (1920) I Knapp. 245. | (8) (1906) 3 C. L. J. 606, 613. |
| | (9) (1901) I. L. R. 29 Calc. 260, 275. |
| | (10) (1904) I. L. R. 31 Calc. 895, 896,
899. |
| | (11) (1905) 9 C. W. N. 528, 534. |

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[JENKINS C.J. That a gift for religious purposes is bad cannot be contended. The only question following the case of *Runchordas* (1) would be about uncertainty.]

Manohar Ganesh Tambekar v. Lakhmiram Govindram (2) is in my favour : see also *Doorga Proshad Dass v. Sheo Proshad Pandah* (3).

An endowment cannot lapse for image being broken : see Sarkar's Hindu law, 3rd Edition, page 422, Medhatithi referred to in Mitakshara, Chapter I, para. 7, section 17, and *Hayasirshapancharatna*. In *Upendra Lal Boral v. Hem Chundra Boral* (4) it was held for the first time that a provision for reconsecration of broken image cannot be validly made. Consecration of image is not its birth. The deity is always in existence. In *Nogendra-Nandini Dassi v. Benoy Krishna Deh* (5) it was contended successfully that such a gift would be void. The case of *Upendra Lal Boral* (4) is directly opposed to it. God can neither be a donee nor a beneficiary.

Mr. H. D. Bose, in reply. Consecration is प्राणप्रतिष्ठा, i.e., giving life. It is capable of accepting a gift only on consecration. God comes and resides in that image. *Jagadindra Nath Roy v. Hemanta Kumari Debi* (6) is distinguishable. The dedication was incomplete in that case and the beneficiary got the legal estate. In all cases, except that of *Gokool Nath Guha* (7), the dedications were to existing *Thakurs*.

Cur. adv. vult.

JENKINS C.J. The questions referred for our determination are :—

(i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void ?

(1) (1899) I. L. R. 23 Bom. 725 ;
 L. R. 26 I. A. 71.

(2) (1887) I. L. R. 12 Bom. 247.

(3) (1880) 7 C. L. R. 278.

(4) (1897) I. L. R. 25 Calc. 405.

(5) (1902) I. L. R. 30 Calc. 521.

(6) (1904) I. L. R. 32 Calc. 129 ;

L. R. 31 I. A. 203.

(7) (1886) I. L. R. 14 Calc. 222.

(ii) Whether the cases of *Upendra Lal Boral v. Hem Chundra Boral* (1), *Rojomoyee Dassee v. Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dassi v. Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

The disposition which has led to this reference is contained in the will of Umesh Chandra Lahiri, and is in these terms :—

“(Ka) All my properties shall be placed in the hands of Babu Ram Lal Maitra, son of late Ram Chandra Maitra of Hari-pur, and the grandsons of my father-in-law, Sriman Kali Prasanna Maitra, Sriman Chandra Maitra, Sriman Pratap Chandra Maitra, Sriman Abhay Govinda Maitra, etc., as trustees. They shall according to the provisions made in para. 4 pay to the persons mentioned in that para., their monthly allowances, as fixed by me : and shall defray the expenses for the performance of rites for the spiritual welfare of my mother, full sister and cousin (father’s sister’s daughter) : and shall pay to my *gurudev* Srijukta Hari Nath Bhattacharya of village Purbasthali in the district of Burdwan Rs. 10 as *barshik* and to my *purohit* Srijukta Srish Chandra Chakrabarty of Salkeah Rs. 5 as *barshik*, and after defraying the expenses for the *sheba* and worship, during my turn of the ancestral *ijmali bighraha*, Iswar Gopal Dev Thakur, Saligram Narain and Iswar Mahadev Thakur, they shall spend the surplus income which may be left in the *sheba* and worship of Kalee after the name of my mother, *i.e.*, in the name of Iswar Anandamoyee Kalee. The image of the deity shall be established and consecrated at my dwelling-house or at Kashee, and in case any of the persons mentioned in para. 4 dies, then the allowance which I have fixed for him or her, during his or her lifetime, shall, after his or her death, be spent for the worship of the said Iswar Anandamoyee Kalee.

“(Kha) If the said Ram Lal Maitra or any of the grandsons of my father-in-law dies, his heirs shall be appointed in

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his place, in order of seniority and act according to the provisions made in para. (ka) and hold the estate as trustees. If any of those heirs be a minor, then his lawful guardian shall hold the estate during his minority, and when he will have attained his majority then the estate shall pass into his hands as a trustee."

The will then goes on to provide that if for any reason the image of Iswar Kalee Debee is not established and if the income of the testator's properties is not used for her *sheba* and worship, then the testator's *gurudev* and his sons, grandsons, etc., in succession should get his Rangpur properties and possess the same in absolute right from generation to generation

The facts as found by the referring Bench are briefly these : Umesh Chanda Lahiri died on the 28th June 1890, and in the events which have happened Hem Chandra Lahiri became and now is his heir-at-law. It was not until 1894 either in the month of October or November, that the executors for the first time established and consecrated an image of the Kalee. The image so established was in the first instance of earth, but in 1899 it was replaced by one of stone and a temple was built for its location. The worship has ever since been duly carried on as provided in the will. All we have to consider is whether the fact that the image was established and consecrated for the first time after the testator's death invalidates the provision in the will.

It is necessary to observe the precise character of this provision. It does not purport to be a simple gift of property to an image to be consecrated as was to some extent the basis of the appellant's argument before us ; but the testator directed all his property to be placed in the hands of persons named by him and subject to certain payments these persons were directed to spend the surplus income which might be left in the *sheba* and worship of Kalee after establishing the image of the Kalee after the name of the testator's mother. Now this manifestly was a disposition for religious purposes and such dispositions are favoured by Hindu law. Thus it is said by Katyayana : " If a gift be promised by a person whether in health

or sickness for a religious purpose, and he dies without making it, his son should be compelled to make it: Of this there is no doubt" (see Mandlik's Hindu law, page 124). Again in the Chapter of the Mitakshara which deals with gifts it is said "whatever has been promised to any body for religious purposes should be given to him without fail": see Mitakshara, Vyavahara Adhyay, Part III, Chapter IV, section 14 (translated by the late Girish Chandra Tarkalankar). "Property," it is said, "thus given by a man or appropriated (by him) to religious uses cannot be set aside by his son and the rest. The giver is competent to take care of the wealth or property endowed for religious purposes. He can no longer resume it, because *Dharma* is the then master or owner of such property. Let the owner himself or his representative, O Goddess! appropriate to pious purposes the corpus of a property or its income according as it may have been resolved": Mahanirvana Tantra, section 12, vv. 92—94. Other texts might be cited in support of this view, but it is unnecessary to elaborate this point.

And it is not in the texts alone that sanction is to be found for the view that dispositions for religious or charitable purposes are favoured: the leaning of the Courts too is in the same direction. Thus in the *Mayor of Lyons v. E. I. Co.* (1), it was said "Their Lordships are well aware that in pursuing this course they are sanctioning a proceeding for which there is no exact and complete precedent in the administration of charitable funds in this country; but in one respect there is sufficient authority, viz., as far as regards a postponement of distributions and the not declaring the gift void on account of any present difficulty in giving it effect: the case of *A.-G. v. Bishop of Chester* (2) furnishes a direct authority for not declaring a legacy void, because it was for an object which could not at the time be accomplished and for retaining the fund in Court until it should be possible to apply it."

Now, had the direction in the testator's will simply been that the surplus income should be spent "in the *sheba* and worship

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(1) (1836) 1 Moo. I. A. 175.

(2) (1785) 1 Bro. Ch. 444;
 28 E. R. 1229.

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of Kalee," it would, I think, clearly have been good, for the purpose would have been religious and the direction would not have been bad for uncertainty.

On the question of uncertainty we may look for assistance to the English decisions [*Ranchordas Vandravandas v. Parvati Bai* (1)], and in England it has been held that gifts "for the worship of God" or "to be employed in the service of my Lord and Master" are good: [*A. G. v. Pearson* (2), *Powerscourt v. Powerscourt* (3), and *Re Darling* (4)]. Then does it invalidate the disposition that the discretion is for the spending of the surplus income in the *sheba* and worship of the Kalee "after establishing the image of the Kalee after the name of my mother?" I think not: the pious purpose is still the legatee, the establishment of the image is merely the mode in which the pious purpose is to be effected: see *Mills v. Farmer* (5). And the decision in *Ramtonoo Mullick v. Ram Gopaul Mullick* (6) shows that the pious purpose does not fail merely because the testator directs as a means of carrying it into effect, that something should be done after his death: [see too *Mayor of Lyons v. E. I. Co.* (7) and *Parmanandas Jivandas v. Vinayek Rao Wassudeo* (8)]. But then it is urged that the decision in *Upendra Lal Boral v. Hem Chundra Boral* (9) is against the validity of the disposition now under consideration. There, apparently, power was given by a testator to his wife to establish the service of an idol and by making a will in favour of it to manage the properties, construct a temple and perform the *sheba*.

In relation to those dispositions it was said, "if there was a gift to the idol it was bad because there was no idol in existence at the time of his death." In the first place, it is this decision that has principally led to the present reference, so that it cannot be regarded as in itself an authority binding on us. Next it is to be noticed that the learned Judges did not consider the aspect of the case which I have been discussing,

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| (1) (1899) I. L. R. 23 Bom. 725; | (5) (1815) 19 Ves. Jun. 482, 486. |
| L. R. 26 I. A. 71. | (6) (1829) 1 Knapp. 245. |
| (2) (1817) 3 Mer. 353. | (7) (1836) 1 Moo. I. A. 175. |
| (3) (1824) 1 Mol. 616. | (8) (1878) I. L. R. 7 Bom. 32. |
| (4) [1896] 1 Ch. 50. | (9) (1897) I. L. R. 25 Calc. 405. |

but treated the disposition with which they were concerned, as though it were a simple gift to a non-existent idol.

I have shown that the disposition with which we have to deal in this case is something different from that.

But apart from that I think we should not regard the decision in *Upendra Lal Boral's case* (1) as affording any sufficient reason for holding the direction now under consideration as invalid.

That decision purports to rest on the authority of *Bai Motivahu v. Bai Mamubai* (2) where their Lordships after referring to the *Tagore case* (3) say, "Two rules applicable to the will now under consideration are laid down in the judgment of the Committee": one is "that a person capable of taking under a will must be such a person as would take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator," page 70 And it is said (page 69): "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect from death they are generally so to be regarded as to the property which they can transfer and the person to whom it can be transferred."

Now, turning to the *Tagore case* (3), we find that the rule against a gift to a person not in existence and capable of taking from the donor at the time when the gift is to take effect, rests on the principle expressed in *Dayabhaga*, Chapter 1, ver. 21, by the phrase "relinquishment in favour of the donee who is a sentient person."

This passage in the *Dayabhaga* is used to illustrate the proposition that the "right of one may consistently arise from the act of another," and it is there pointed out in proof of this that in the case of donation the donee's right to the thing arises from the act of the giver; namely, from his relinquishment in favour of the donee who is a sentient person.

(1) 1897) I. L. R. 25 Calc. 405.

(3) (1872) 9 B. L. R. 377;

(2) (1897) I. L. R. 21 Bom. 709;

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The Privy Council evidently considered the later of these two cases was governed by the earlier, notwithstanding that to the one the Mitakshara and to the other the Dayabhaga applied, and that in relation to the question involved in the text cited the contentions of the two schools are not in complete harmony. So it is immaterial that the referring Bench does not state which school of law applies in the circumstances of this case. It is, no doubt, true that an idol has been frequently described as a juridical person and even as owning property [*Shibessouree Debia's case* (1)], but it has since been explained that it is only in an ideal sense property can be said to belong to an idol: [*Prasunno Kumzri Debia's case* (2) and *Jagadindra Nath Roy's case* (3)]. Whether this ideal sense means more than that the dedication to a deity is a compendious expression of the pious purposes for which the dedication is designed, may be a question.

In favour of this view we have the doctrine of Medhatithi cited to us in the course of the argument that the primary meaning of property and ownership is not applicable to God, and the train of reasoning that is suggested by the teaching of the Aditya Purana that the Gods cease to reside in images which are mutilated, broken, burnt, and so forth. (Saraswati's Hindu Law of Endowment, page 129).

But whatever may be the true view on this obscure and complex question, this at least seems clear that the rule which requires relinquishment should be to a sentient person does not forbid the gift of property to trustees for a religious purpose, though that purpose cannot in strictness be called a sentient person: [*Ramtonoo Mullick's case* (4)]. It would seem that the rule propounded by Jimutavahana had regard rather to the general proposition for which he was contending, *i.e.*, that the act of the giver is the cause of property, than to its application to particular objects of benevolence. The fiction that an idol is a person capable of holding property must be kept within its proper limits, and were we to accede to the

(1) (1869) 13 M. I. A. 170.

(2) (1875) 14 B. L. R. 450;

L. R. 2 I. A. 145, 152.

(3) (1904) I. L. R. 32 Calc. 129;

L. R. 31 I. A. 209.

(4) (1829) 1 Knapp. 245.

argument that has been advanced before us, we should be allowing fiction to be built on fiction to the hinderance and not for the furtherance of justice.

In my opinion, therefore, the reference should be answered by saying that the principle expressed by the phrase "relinquishment in favour of the donee who is a sentient person," does not apply to the direction contained in the testator's will that the persons indicated by him shall spend the surplus income in the *sheba* and worship of Kalee after establishing the image of the Kalee after the name of the testator's mother, and that if and so far as the cases cited in the reference conflict with this view they have not been correctly decided.

STEPHEN J. In this case I have had the advantage of reading the judgments of my colleagues before writing my own. agree with their conclusions and concur in their reasons and have in fact nothing to add to what they have said. But by reason of the importance of the case I wish to explain briefly how the matter presents itself to me, relying on my brothers Mookerjee and Chatterjee for the contents of Hindu texts, which are of prime importance in the decision of the question before us.

There is no doubt, in the first place, that dedication by a Hindu of property to a deity is not only lawful, but commendable in a high degree. But the question arises what is the legal effect of such a dedication. A gift consists of two parts, abandonment of rights over the subject-matter of the gift by the donor, and acceptance of those rights by the donee. In a dedication to a deity, the abandonment by the donor takes place according to the ordinary law, but there can be no acceptance by the deity. Why this should be so may be a matter that we need not enquire into ; but the fact appears to me to be explained by two self-evident propositions, namely, that it is a contradiction in terms, to talk of the Creator accepting anything, in the legal sense of the word, from a creature, and that it is inconceivable that laws which were made for, if not by, men should be applicable to a deity.

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But though a dedication to a deity does not constitute a gift, it has a legal effect. The intention of the donor is that the subject-matter of the gift shall be used for doing honour to the deity by worship and for conferring benefit on the worshippers and the ministers of the deity who conduct it. This worship is properly and, I understand, necessarily carried out by having recourse to an image or other physical object; but the image is nothing till inspired by the deity. It is the duty of the Sovereign to see that the purposes of the dedication are carried out.

On, and consistently with, this basis of general principles, modern law has arrived at certain conclusions. Of these the most important, for present purposes, is that an idol after it has been duly constituted is a juridical person in an ideal sense. The practical meaning of this somewhat elusive expression is that the ministers of an idol have over the property dedicated to the idol, which is the same thing as the deity inspiring the idol, the same rights that they would have if they were trustees for his benefit, or if he was an infant and they managers on his behalf, being at the same time liable to corresponding duties legally enforceable. This seems to me to show that such a dedication as the present is a devise for a religious purpose, such as, on the authorities referred to by my learned brothers, would be recognised as valid by English law, and not considered as bad for uncertainty.

The above considerations leave no room in the case of a dedication to a deity for the application of the rule as to the invalidity of gifts other than to sentient being laid down in the *Tagore case* (1), and it follows that the present case and the subsequent cases quoted in the reference before us must be held to have been wrongly decided.

MOOKERJEE J. The two questions of law which have been referred for decision by the Full Bench have been formulated in the order of reference in the following terms:

(i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it,

(1) (1872) 9 B. L. R. 377.

apply to bequests to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, and make such a bequest void ?

(ii) Whether the cases of *Upendra Lal Boral v. Hem Chundra Boral* (1), *Rojomoyee Dassee v. Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dassi v. Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void ?

The will of the testator, upon the construction of which these questions have arisen for consideration, directed that, in the event of the failure of a son or adopted son to the testator, after provision made for certain bequests, the executors were "to spend the surplus income which may be left, in the *sheba* and worship of Kalee, after establishing the image of Kalee after the name of my mother, *i.e.*, in the name of *Isvar Anandamayee Kalee* ; the image of the deity shall be established and consecrated at my dwelling-house or at Kasee."

The plaintiffs commenced the present action for construction of the will and for a declaration that the trust for the establishment and consecration of the image of the Goddess Kalee and her worship was void, inasmuch as the deity had not been established in the lifetime of the testator.

We have been invited by the learned counsel for the appellants to answer the questions stated in the order of reference in the affirmative. It has been argued upon the authority of the decisions of the Judicial Committee in the cases of *Tagore v. Tagore* (4) and *Bai Motivahu v. Bai Mamubai* (5), that a person capable of taking under a will must be such a person as can take a gift *inter vivos*, and, therefore, must either in fact or in contemplation of law be in existence at the time of death of the testator. It has been assumed that this rule is applicable to a bequest to trustees for the establishment of a

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(1) (1897) I. L. R. 25 Calc. 405.

(2) (1901) I. L. R. 29 Calc. 260.

(3) (1902) I. L. R. 30 Calc. 521.

(4) (1872) 9 B. L. R. 377 ;

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(5) (1897) I. L. R. 21 Bom. 709 ;
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Hindu deity, and the inference has been drawn that the manifestation of the deity in the form of an image must be in existence at the time of the death of the testator. As reliance has been placed upon two decisions of the Judicial Committee, which, in so far as they decide any questions of law, are binding upon this Court, it is essential to examine closely the decisions themselves, and to determine whether they are really applicable to the matter now under discussion. In this connection, it is useful to bear in mind the well known observation of Lord Halsbury in *Quinn v. Leatham* (1), that a case is only an authority for what it actually decides, and cannot be quoted for a proposition that may seem to follow logically from it.

In the case of *Tagore v. Tagore* (2) the question which arose for consideration was as to the validity of testamentary bequests and gifts *inter vivos* in favour of human beings. With reference to this subject, their Lordships of the Judicial Committee observed that the legal power of transfer under the Bengal School of Hindu law applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Dayabhaga, Chapter I, para. 21, by the phrase "relinquishment in favour of the donee who is a sentient person." They then went on to add that, by a rule generally adopted in jurisprudence, this class will include children in embryo, who afterwards might come into separate existence, and also by legal fiction, an adopted son, who, in contemplation of law, is begotten by the father who adopts him, or for and on behalf of whom he is adopted; apart from this exceptional case which serves to prove the rule, the law was plain that the donee must be a person in existence capable at the time when the gift takes effect. It is not necessary for my purpose to investigate the precise scope of the passage of the Dayabhaga upon which reliance has been placed in support of the proposition that a gift to be valid must be in favour of a sentient person in existence

(1) [1901] App. Cas. 495, 506.

(2) (1872) 9 B. L. R. 377;
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and capable of taking from the donor at the time when the gift is to take effect. I shall assume this was the view adopted by Jimutavahana. The question, however, necessarily arises whether this doctrine is applicable to the case of bequests for the establishment of images of the deity and for their worship. To secure an answer in the affirmative to this question, it is argued that, by a fiction of law, an idol is a juridical person, and in support of this view reliance is placed upon the cases of *Shibessouree Debia v. Mothooranath Acharyo* (1) and *Prosunno Kumari Debia v. Golap Chand Baboo* (2). The later decision of the Judicial Committee in the case of *Jagadindra Nath Roy v. Hemanta Kumari Debi* (3), however, tends to indicate that this fiction must be employed cautiously and subject to many limitations. We must not, therefore, assume too readily that a Hindu deity is a juridical person for all purposes, and stands on precisely the same footing, capable of the same rights, and subject to the same liabilities, as an ordinary sentient being, and we must closely examine the scope of the applicability of the passage in the Dayabhaga, which is the foundation of the argument that a bequest for the establishment of an image of a Hindu deity and for its worship is subject to the same rules as a bequest in favour of a human being.

The passage in the Dayabhaga, which is supposed to go to the root of the matter, is as follows :

इदं च लोकेऽपि दाने हि चैतनीद्देशविशिष्टत्वात्तादेव दातव्यापरात् सम्प्रदानस्य द्रव्ये
स्वान्वितम्। (Bharat Shiromani's Edition, 1863, page 25.)

This is translated by Colebrooke as follows : "That is actually seen in the world, since, in the case of donation, the donee's right to the thing arises from the act of the giver, viz., from his relinquishment in favour of the donee who is a sentient person." (Chapter I, para. 21.)

In the very next passage Jimutavahana proceeds as follows :

परस्वत्त्वापत्तिफलैर्न हि दानरूपता, तत्र फलं सस्यदानाधीनम्। (Page 27.)

(1) (1869) 13 Moo. I. A. 270.

(2) (1875) 14 B. L. R. 450; 23

W. R. 253; L. R. 2 I. A. 145.

(3) (1904) I. L. R. 32 Calc. 129;

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This is translated by Colebrooke as follows: "Gift consists in the effect of raising another's property; and that effect would here depend on the donee." (Chapter I, para. 22.)

On the first of these passages Rambhadra comments as follows :

एतेन स्वामि वक्रज्ञोपहितयागोदानमिति दानलक्षणं सूचितम् ।

"By this, 'gift is abandonment characterised by the result of ownership'—this definition of gift is indicated."

Sreenath comments as follows :

एतेन स्वामि-वक्रज्ञोपहितं त्यागरूपं दानलक्षणमित्युक्तम् ।

"It is said hereby that the definition of donation is abandonment characterised by the result of ownership."

Sreekrishna comments on the passage as follows :

त्यागनात्वात् वषोत्तर्गादिभ्यात् स्वामिवाजननात् आह "चेतीनद्वेष्टेति" । "उद्देशः स्वामिनेन विषयता । सा च त्यागामिकाया इच्छाया एव इति" ।

"As ownership does not arise from every act of abandonment *like the offering of a bull*, etc., he (the author) adds 'intended for some conscious being.' The intention must have for its object the ownership (of another) and this object is the object of the desire of abandonment."

On the second passage, Rambhadra comments as follows :

अन्योद्देश्यकत्यागविषयत्वं अस्वामिकाया ग्रहणे देवस्य गृह्णन्वत् प्रत्यवायात् । एतद्विषयकमेव देवस्य ब्राह्मणस्य वा ये हरन्तोत्यादि वचनम् । अथवा चौर्यस्य पापहेतुत्वासिद्धौ ब्राह्मणस्व-हरणनिषेधानर्थक्यम् । एवञ्चान्यथानुपपत्त्या स्वपद-हरणपदे लाक्षणिके ।

"Since sin arises from the taking of property without any owner, which is the object of an abandonment intended for another as from the taking of the property of the Gods. The passage of Manu 'Those who steal the property of the Gods or the property of the Brahmans, etc.,' refers to this subject. Otherwise, as theft is already admitted as a case of sin, the prohibition of the stealing of a Brahman's property becomes superfluous. Thus, there being no other way to avoid this inconsistency, the terms 'property' (स्व) and 'stealing' (हरण) must be taken in a figurative or secondary sense."

It is clear from these passages, as well as from other passages from Sreenath, Achyutananda, and other commentators on the Dayabhaga, that they understood the rule about

the acceptance of a gift as a necessary condition for its validity as applicable to secular gifts alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing. In fact, as Sreenath points out, an abandonment in favour of the deity is not comprehended within the term 'gift.' It is obvious from this that in the case of donation, after the owner has parted with his rights and before the subject-matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation to persons.

Again, Shoolapani in his *Sraddhabibeka* discusses whether a *sradh* can be called a gift, and in that connection observes as follows :—

न च दानरूपता, उद्देश्यपिनादि-गतस्वामित्वाजनकत्वात् । अस्वामित्वञ्च पिनादीनां समेदमिति स्वीकाराभावात् । आदित्यादिदेवतासम्यदानकदाने तु दानशब्दो गौणः, तद्वत्सदृशदानाद्यतिदेशात् । देवग्रामीहस्तिग्राम ईत्यादि प्रयोगान्तु गौण एव इत्युक्तं तिथ्यगधिकरणे । (Calcutta Edition, 1892, page 25.)

Of this passage, the following version will give a fairly accurate idea :

"*Sradh* has not the nature of a donation, as it does not generate ownership in the *manes*, etc., for whom it is intended. The absence of ownership of *manes*, etc., is due to the absence of acceptance on their part by the words 'this is mine.' In 'donation,' having for its dative case the Gods like the Sun, etc., the term 'donation' has a secondary sense. The object of this figurative use being extension to it of the inseparable accompaniment of that (*gift* in its primary sense), *viz.*, the offer of the sacrificial fee, etc. It has already been remarked in the Chapter on the *bratis* that such usage as *devagram*, *hastigram*, etc., are secondary."

Upon this passage Sree Krishna comments as follows :—

देवानां च इन्द्रादीनां अवेतनतया द्रव्यस्वायभावात् । तर्हि कथं देवग्राम इति प्रयोगः, गौण इत्युक्तं तिथ्यगधिकरणे ।

"The Gods Indra, etc., being devoid of consciousness, cannot have ownership in any object. Then how can the

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expression *devagram* (village of the Gods) be used? It has been remarked in the chapter on *bratis* that the sense here is secondary."

Sree, Krishna in his explanation of the term *devagram*, makes the following comments :

तथाचात्र स्वस्वामिभावकृपसम्बन्धात् मुख्यप्रयोगी न भवत्येव । किन्तु तदुद्देश्यक-
त्यागं प्रतीकान्तरिणी, तेन देवोद्देश्यकत्यागविवक्षो याम् इत्यर्थे गौण इत्यर्थः ।

"Moreover, the expression cannot be used here in its primary sense. The relation of one's ownership being excluded, the possessive case affix in *devas* (in the term of *devagram*) figuratively means abandonment for them (the Gods). Therefore, the expression is used in the sense of 'a village, which is the object of abandonment intended for the Gods.' This is the purport."

When we turn to the *Suddhitatwa* of *Raghuandan*, we find the subject of donation discussed. Thus in one passage he observes as follows :

तेन शास्त्रीकसम्प्रदायस्वत्वापादकं द्रव्यत्यागो दानम् । (Calcutta Edition, 1891, page 308).

"Thus donation is the abandonment of an object productive of the ownership of a person to whom it is given as prescribed in the shastras."

In another passage he says again :

एवञ्च त्यागात् निवृत्तमपि दातुः स्वत्वं सम्प्रदानायच्छात् असम्यक्त्वेन तस्य अदानत्वमुक्तः । (Page 314.)

"Thus, though the ownership of the donor ceases to exist in consequence of abandonment on account of the non-acceptance by the person to whom it is given, it is incomplete and consequently it is not regarded as a donation in the Vedas."

In a third passage *Raghuandan* makes the following remarks :

ततश्च उद्देश्य प्राप्त्यवधिर्वा यदि न स्वीकरोति, तदा सीपाधित्यागावशिष्यस्य अनिर्वाहात् दातुः स्वत्वं निवर्तते इति रत्नाकरप्रसक्तयः । (Page 308.)

"Thus, if the particular person for whom a gift is intended does not accept it, then as the abandonment with all its conditions is not fulfilled, the ownership does not terminate. Such is the view of *Ratnakar* and others."

This indicates that in the case of dedication to the deity, the term "gift" or "donation" has properly no application at all. This is also supported by the following observations of Sree Krishna in a passage of his commentary on the Sradhabhiksha :

अथ द्रव्यत्यागिन स्वत्वजनने सत्त्वदानस्वीकार-प्राप्तावीर्यसि सत्त्वकारी कल्पते ।
अतएव उद्देश्य पात्रविशेषी यदि पश्चात् न स्वीकरोति, तदा सीपायित्यागविशेषस्य अनिर्वाहान्
न दातुः स्वत्वं निवर्त्तते इति रत्नाकर प्रसन्नयोऽपि वदन्ति । (Calcutta Edition, 1892, page 16.)

The following rendering gives a fair idea of the above passage :

"Here, in the generation of ownership by the abandonment of an object, the pre-existence of acceptance by the person to whom the object is given is regarded as an auxiliary case Therefore, if the particular person for whom a gift is intended does not accept it afterwards, then, as donation with all its conditions is not accomplished, the ownership of the donor does not cease to exist. This is maintained by Ratnakar and others."

To the same effect is the following passage from the Mitakshara, in which Vijñaneswara, commenting on verse 27 of the Vyavaharadhyaya of the Institutes of Yajñavalkya, observes :

अयमभिसन्धिः स्वस्त्वनिवृत्तिः परस्वत्त्वापादनं च दानम् । परस्वत्त्वापादनं च परी यदि
स्वीकरोति तदा सस्ययते, नान्यथा । स्वीकारश्च विविधः । मानसी वाचिकः कायिकश्चेति ।
(Bombay Edition, 1813 Saka, page 129.)

"Gift consists in the relinquishment of one's own right and the creation of the right of another, and the creation of the right of another man is completed on that other's acceptance of the gift and not otherwise. Acceptance is made by three things—mental, verbal or corporeal."

This is also amply borne out by passages from the Bhasya of Savaraswami on the Purvamimamsa. In one passage Savara defines the characteristics of a gift as follows :

दानं निश्च्युते स्वत्व निवृत्तिः परस्वत्त्वापादनम् । (Adhyaya VI, Pada 1, Asiatic Society's Edition, Volume I, page 742.)

"A gift is the cessation of the ownership of one and the generation of the ownership of another."

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Savara in another passage observes as follows :

देवयामो देवचेचम् इति उपचारमात्रं, यी यदभिप्रेतं विनियोजितमर्हति, तत् तस्य स्वं न च यानं चेचं वा यथाभिप्रायं विनियुङ्क्ते देवता, तस्मात् न सम्प्रयच्छति इति, देवपरिचारकानां तु बतौ भूतिर्भवति, देवतां उद्दिश्य यत् त्यक्तम् । (Adhyaya IX, Pada 1, Asiatic Society's Edition, Volume II, page 145.)

"Devagram (village of the Gods), Deva-kshetram (land of the Gods). These are figurative terms. What one is able to employ according to one's desire is one's property. The Gods, however, do not employ a village or land according to their use. Therefore, no (body) gives (to the Gods). Whatever is abandoned with reference to the Gods becomes a source of prosperity of the servants of the Gods."

Savara amplifies this view in the passage which follows and which need not be quoted at length for our present purpose, and he repeats the same opinion -in Chapter 6, Section I, Volume I, page 606, when he speaks of the Gods as अनौशानाधनस्य, that is, not capable of possessing wealth, and explains the expressions *dhanagram* and *hastigram* as उपचारमात्रम्, that is, as merely figurative terms. See also Adhyaya IX, Pada 1 (Volume II, page 141), where Savara asserts that there can be no gift to Gods, as they have not body and are incapable of enjoyment. (नहि अविग्रहायै अमुङ्कनायै च दानं भोजनं वा सम्भवति) ।

This view is supported by Medhatithi, the oldest and most authoritative of the commentators of Manu. Shastri Golap Chandra Sarkar on behalf of the respondent relied upon the following verse of Manu and the commentary of Medhatithi thereupon. (Mandalik's Edition, page 1354.)

देवस्त्वं ब्राह्मणस्त्वं वा लोभेनोपहिंसति यः ।

स पापात्मा परेलोके गृध्रीच्छिद्येन जीवति ॥ ११, २६ ॥

That wicked man who misappropriates God-property (God's property) and Brahmana-property lives in the next world by the leavings of vultures. *Manu, XI, 26.*

मेधातिथिः ।

१ । यागशीलाणां चयाणां वर्णानां यज्ञितं तदेवस्त्वं ब्राह्मणस्यायागशीलस्यापि यत् स्वं तदब्राह्मणस्त्विति ।

MEDHATITHI'S COMMENTARY.

1. The property of persons of the three regenerate tribes that are in the habit of performing sacrifices is (to be under-

stood by the term) "God-property" (in this text, it is a compound word in the original, in which the word God is not inflected); and the property of a Brahman who is not in the habit of performing sacrifices is "Brahman-property."

२ । एवमपि ह्योक्तो गच्छत्येव । अर्थवादश्चोक्तौ ।

2. Even in this manner this verse may certainly be explained. This sloka (verse) becomes (then) a laudatory one.

३ । धनं यज्ञशौलानामिति न चौद्यदिशब्दवच्छब्दार्थपरिभाषापरः ।

3. For the property of persons habitually performing sacrifices (explained by us as the import of the term "God's property") is not (the meaning) derived from the primary meaning of the words (composing the term, namely, God and property) like (the meaning of) the term stealing and the like (but a figurative meaning).

४ । अतोऽन्वया व्याख्यायते देवानुद्दिश्य यागादिक्रियार्थं धनं यदुत्सृष्टं तद्देवस्त्वं, सुत स स्त्रस्त्रासिस्त्रस्त्रस्त्रदेवानाम् सम्भवात् ।

4. Hence (the term) is explained in another manner (thus)—Property that is set apart or relinquished for the purpose of performance of sacrifices and the like in honour of Gods is (to be taken as intended by the term) "God's property" by reason of the impossibility of the application to Gods of the primary meaning, namely, the relation of property and owner (a thing is property in relation to a person having proprietary rights over it, and a person is owner in relation to a thing over which he can exercise proprietary rights).

५ । नहि देवता इच्छया धनं नियुजते न च परिपालनव्यापारसासां दृश्यते, स्वदेवलोके तादृशमुच्यते तस्मादिवोद्दिश्येन यदुक्तं नेदं मम देवताया इदमिति—तद्देवस्त्वं तच्चदर्शपुण्यमासादि-यागिन्द्रयादिदेवताभ्यश्चोदितं शिष्टसमाचारप्रसिद्धैव गौणीपायदुर्गायागादिषु ।

5. For the Gods do not use the property according to pleasure, nor is their found exertion for the protection (of the property): and property is described to be of that character in popular view. Accordingly, when by referring or pointing to Gods, it is stated—This is not mine, this is God's—that is God's property—and that property is enjoined (by the Vedas) for the Fire-God and the like in the Darsa-purnamassa sacrifice and the like—(and also enjoined) by the well-known practice of the learned (not by the Vedas, for Gods worshipped) in the Durga sacrifice and the like secondary means (of attaining

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spiritual benefit, but not primary, inasmuch as these are not enjoined by the Vedas).

ननु चतुर्भुजादिप्रतिमासंख्ये लोके देवसंमुख्ये लोकप्रसिद्धय शब्दार्थः शास्त्रे ग्रहीतुं न्यायः ।

6. It cannot be argued that in popular view (property) relating to the four-armed or the like image (of Gods) is called "God's property," and it is proper to put the popular meaning on words (employed) in the Shastras.

७। स्यादेवं यदिदेवसंख्ये-निर्भागः प्रसिद्धिमुपेयात्, देवानां स्वं देवसंमुख्यव-प्रसिद्धा समुदायार्थः प्रकटः, न च वाक्यान्तरप्रकल्पनाप्रमाणेनाप्यस्ति ।

7. It would be so if the term "God-property" acquired notoriety (in that sense), undivided (into, or without reference to, its component parts)—God and property; but by reason of the notoriety of the component parts, namely, God's property is God-property, the meaning of the whole (as consisting of the meanings of the component parts) is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning.

८। मुख्यं चतुर्भुजादीनां देवत्वं प्रतिमान्यवहारिणेष्वपहृतं ।

8. The assumption that the four-armed and the like have the status of God in the primary sense, is removed by the very use of (the term) image (in para. 6).

९। न च यद्युक्तलक्षणमस्ति अथ समाचारतो देवत्वं भवतु स्वस्वामि भावस्तावन्नास्ति यद्योक्ति न च प्रकारेण स्वयंवहारोपपत्तिरिति शिष्टं द्वितीयं ॥

9. Nor can it be argued that although there is no God in the primary sense, still let such property be God's property by usage. Be it so; but there cannot be the relation and owner. The use of the term property (as God's) may be reconciled in the manner stated (above by us). This is discussed in the second.

The concluding reference is to the commentary of Medhātithi himself on the Second Book of the Institutes of Manu, where he observes as follows on verse 189 :

एवं देवत्वं देवपशवो-देवद्रव्यं इत्यादयो व्यवहाराः तादर्थ्येन उपकल्पितेषु पश्चादिषु द्रष्टव्याः । दण्डाधिकारितुं प्रतिफलितिविषयम् एव देवताव्यवहारं दृक्कृति । अन्यथा व्यवस्थामङ्गः स्यात् । कल्पितदेवतारूपानां प्रतिफलितानां कल्पितेनैव स्व स्वामिभावेन यत् सम्बन्धिदेवतास्मरणं तात् द्रव्यं विज्ञेयमुत्तममित्यादिषु—देवद्रव्यं नहि देवनानां स्वस्वामिभावोऽस्ति सुव्याख्या-सम्भवात् मौण्य एवार्थः, याज्ञः (Mandalik's Edition, page 237.)

It should be noticed that such expressions as property of the Gods, animals of the Gods, thing of the Gods, etc., mean animals, etc., supposed to be intended for the Gods. In the section on punishment, the term (देवता) 'God' is desired to be used in the sense of images only; otherwise there would be an upsetting of the established order. In such texts as "anything good belonging to the Gods, Brahmans and Kings should be known, etc., i.e., a thing belonging to the Gods which is connected with an imaginary ownership of the images or likenesses imagined to be Gods. *The Gods have no ownership of their own*, and so the primary sense being inadmissible here, the secondary sense alone should be accepted."

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It is conclusively established from these authorities that according to strict Hindu juridical notions there can be no gift in favour of the Gods. We are not concerned now with the philosophical reason for this position, and it is needless to enquire whether it is due to the fact that in the earliest times physical objects were deified, and could not, therefore, be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived as a being to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance. Durgacharyya, however, in his commentary on the following passages of the Nirukta, seems inclined to adopt the view that as the Gods were originally physical objects deified, they could not very well be regarded as sentient beings capable of acceptance of gifts in the strict sense of the terms.

अथाकार चिन्तनं देवतानां पुरुषविधाः सृष्टिरित्येकं चेतनावद्द्विस्तयोभवन्ति तथाभिधानान्वयापि पौरुषविधिकैरङ्गैः संस्तुयन्ते । “ ऋषा तं इन्द्रस्य विरस्य वाक् ” (ऋग्वेद ४।७।३१।३) । “यत् संगृह्णा मधवन् काशिरित्ति” (ः।२।११।३) तथापि पौरुष विधिकैः द्रव्यसंयोगैः । आ हास्यां हरिभ्यामिन्द्र याहि (२।६।२१।४) “कल्याणीजाया सुररां गृह्णते” (३।१।१८।६) अयापि पौरुष विधिकैः कर्मभिः । “अङ्गीन्द्र पिबथ प्रस्थितस्य” । (८।६।२१।८) “आयुत् कर्णं युधी हवन् (१।१२०।८) * * * अपुरुष विधा सृष्टिरित्यपरमपि तु यद् दृश्यतेऽपुरुषविधं तद् यथाग्निवायुरादित्यः पृथिवी चन्द्रमा इति यद्यो एतच्चेतनावद्द्विस्तयो भवन्ति इत्यचेतमान्यथैवं स्तुयन्ते यथाऋषयस्तौ-न्योषधि पर्यन्तानि यद्यो एतत् पौरुष विधिकैरङ्गैः सं स्तुयन्त इत्य चेतनैर्ब्रह्मेतद्वक्तव्यमिहोक्तं “हरितेभिरावुभिरिति” (८।४।२८।२) योषस्तु सियेया एतन् पौरुषविधिकै - द्रव्यसंयोगैरित्येतदपि सादृश्यमेव सुखं रथं ययु ज

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सिन्धुरश्मिन् (८१।७।४) इति नदीस्तुति यथा एतत् पौरुषविधिकैः कर्मभिरित्येतदपि तादृशमेवः
“हातु शित् पूर्वे हविरया माशतेति (८४।२९।२) यावस्तुतिरेव । (निरुक्त उत्तरष्टक् देवत
काण्ड; अध्याय ३, पाद २, खण्ड ३) ।

The following version will give a fairly accurate idea of the passage which deals with the subject of the anthropomorphic and physical conception of the Gods :—

“ One conception of the shapes of the Gods is that (they are) like human beings, inasmuch as the praises (of the Gods) speak of them like conscious beings. So also are their designations. They are praised with man-like limbs. As in Rigveda, 4, 7, 31, 3 : ‘Oh Indra ! Thou art bulky in thy graceful arms.’ Rigveda, 3, 2, 1, 5 : ‘Oh Maghaban ! As thou joinest together the two worlds (earth and heaven) large as thy fist.’ (They are praised also) as possessed of things used by men. Rigveda, 2, 6, 21, 4 : ‘Come Indra ! with a pair of horses.’ Rigveda, 3, 3, 19, 6 : ‘In thy house is an auspicious wife [Sachi] ; they are praised also with acts of human beings.’ Rigveda, 8, 6, 21, 8 : ‘Eat, Oh Indra ! and drink of (these) lying before.’ Rigveda, 1, 1, 20, 9 : ‘Oh Indra ! having ears, hearing all around, listen to our invocation quickly.’ The other (conception of the shapes of the Gods) is found to be that (the Gods) are not like human beings, as the fire, the air, the sun, the earth, the moon. The hymns represent them like conscious beings, and for this reason even unconscious objects are so praised, such as dice and things like these down to plants that yield only a single harvest. Thus, they are praised as if possessed of limbs like human beings. So it is even with unconscious things. Rigveda, 8, 4, 29, 2 : ‘These stones used for pressing out (*soma* juice) with their green mouths are crying after (the Gods).’ As this is a praise of the stones, so is the following a praise by connecting with things that are used by human beings. Rigveda, 8, 3, 7, 4 : ‘Sindhu river joined a comfortable chariot furnished with horses.’ As this is a praise of the river, so is the (following) nothing but a praise of stones by attributing actions like those of human beings. Rigveda, 8, 4, 29, 2 : ‘Let the stones eat clarified butter fit for eating before the invoker of the Gods (Agni).’ ”

The same view is supported by Rigveda, 1, 1, 11, 1, and Atharvaveda, Book XX, Hymn 26, 4 and 5. It is not necessary, however, to pursue this line of investigation further. We start with the position that in the case of deities there cannot be any acceptance and, therefore, necessarily, any gift. If, therefore, a dedication is made in favour of the deity, what is the position? The owner is divested of his rights. The deity cannot accept. In whom does the property vest? The answer is that the King is the custodian of all such property. This is sufficiently indicated by the following passages: Vijnaneswar in the Mitakshara (Vyavahara Adhaya, verse 186) lays it down that one of the duties of the King is the protection of the Devagriha, and Aparaditya and Mitramisra in their commentaries on the same subject lay down the rule in the same manner. In the Sukraneti, Chapter IV, verse 19, stress is laid upon this as one of the primary duties of Kings. The true Hindu conception of dedication for the establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property; the King, as the ultimate protector of the State, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but from the dedication, religious merit and spiritual benefit accrue to the founder and material benefit accrues to the person in charge of the worship and to the creatures of God.

It may further be observed that it is indisputable that the Hindu law encourages dedication of property for religious purposes. It is sufficient to refer to the following passage from Katyayana :

सुखेनार्त्तं न वा दत्तं श्रावितं धर्मकारणात् । अदत्त्वा तु मृते दाप्यस्तत्सुतीनावसंशयः ॥
which is rendered by Mandalik as follows (page 124, Edition Yajnavalkya):

“If a gift be promised by a person, whether in health or in sickness and for a religious purpose, and he dies without making it, his son should be compelled to make it. Of this there is no doubt.”

There can be no question as to the genuineness of the passage, because it is quoted with approval in the Mitakshara,

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Viramitrodoya, Vyavaharamadhaba, Vyavaharamayukha, Kamalakar's Vivadatandab, Raghunandan's Suddhitattwa, Vivadaratnakar, and in Jagannath's Vivadabhangarnaba translated by Colebrooke. The spirit, if not the letter, of this text is entirely inconsistent with the position that a direction given by a Hindu that an image of a deity should be established, and that his property should be applied for the maintenance of the worship, is inoperative, because the image was not established by himself. Jagannath in Book II, Chapter IV, Section I, verse 3, touches upon this matter, and points out that the text of Narada relating to the recovery of objects of gifts not duly given (Asiatic Society's Edition 137) has no application to religious gifts. The conclusion, therefore, is irresistible that the doctrine laid down by the Judicial Committee in the cases of *Tagore v. Tagore* (1) and *Bai Motivahu v. Bai Mamubai* (2), as to gifts in favour of sentient beings, has no application to directions for the dedication of property for the establishment of images and for the worship thereof.

It has been argued before us that even if it be assumed that the rule about acceptance applies in the case of the deity as in the case of sentient beings, the validity of the testamentary disposition may be upheld, inasmuch as the deity is always existent, and it is immaterial whether the image is established or not. The argument in substance is that, to take a concrete example, whether a particular image of Kalee is established or not, the Goddess Kalee is ever-existent, and a gift for the purpose of her worship is valid, although at the time of the death of the testator there is no image in existence. In support of this view reliance has been placed upon the following passage quoted by Raghunandan :

चिन्तयन्ती त्वीदं निवृत्तस्वाशरीरिणः ।

उपासकानां कार्यार्थं ब्रह्मर्षी रूपकल्पना ॥

“It is for the benefit of the worshippers or devotees that there is manifestation in male and female forms of the supreme being, which is bodiless, which has no attribute,

(1) (1872) 9 B. L. R. 377; 18 W. R. 359; L. R. I. A. Sup. Vol. 47.

(2) (1897) I. L. R. 21 Bom. 709; L. R. 24 I. A. 93.

which consists of pure spirit, and which is without a second being."

Various passages of the same import are to be found in other authorities, for instance, *Haratatwadidheeti* and *Mahanirvantantra* (4, 16), the latter of which quotes a passage from *Mundamalatantra* and gives other texts of similar import from *Kularnabtantra* and *Agastya Sanhita*. From this point of view also, the position of the appellant may be undoubtedly supported; but it is not necessary to base my opinion upon this ground, for it is established beyond the possibility of dispute that the ordinary conception of a gift is not applicable to the case of dedication to the deity.

Let us now consider the decided cases from the point of view of the principles already explained. The cases of *Upendra Lal Borul v. Hem Chundra Borul* (1), *Rojomoyee Dassee v. Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dass v. Benoy Krishna Deb* (3) proceeded on the assumption that the rule in the case of *Tagore v. Tagore* (4) and *Bai Motivahni v. Bai Mamubai* (5) is applicable to cases of dedication of property for the establishment of images of deities and for their worship. The case of *Promotha Nath Roy v. Nagendrabala Chaudhrani* (6) rests on the same assumption. The case of *Doorga Proshad Dass v. Sheo Proshad Pandah* (7) does not directly touch the point, though it appears to have been held that an idol cannot be said to have juridical existence, unless it has been consecrated by proper ceremonies and so has become spiritualised. Nor does the earlier case of *Sibchunder Mullick v. Treepoorah Soondry Dossee* (8) really affect the question now under consideration. The Court proceeded on the ground that it would not require trustees to carry out trusts for religious purposes under the will of a Hindu, unless those purposes were defined. On the other hand the cases of *Ramtonoo*

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(1) (1897) I. L. R. 25 Calc. 405.

(2) (1901) I. L. R. 29 Calc. 260.

(3) (1902) I. L. R. 30 Calc. 521.

(4) (1872) 9 B. L. R. 377;

L. R. I. A. Sup. Vol. 47.

(5) (1897) I. L. R. 21 Bom. 790 ;

L. R. 24 I. A. 93.

(6) (1908) 12 C. W. N. 808

(7) (1880) 7 C. L. R. 278.

(8) (1842) Fulton 98.

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Mullick v. Ramgopaul Mullick (1), *Gokool Nath Guha v. Issur Lochun Roy* (2), *Prafulla Chunder Mullick v. Jogendra Nath Sreemany* (3), *Ashutosh Dutt v. Doorga Churn Chatterjee* (4), *Hemangini Dasi v. Nobin Chand Ghose* (5), *Parbati Bibee v. Ram Barun Upadhya* (6), *Jairam Narronji v. Kuverbai* (7), *Manohar v. Keshavram* (8), *Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen* (9) are all based on the contrary assumption that a trust for a religious purpose is not invalid, because the image to be established is not in existence at the time of the death of the testator, and I may add that this latter view undoubtedly represents what was regarded as the law from the time of the decision of the Judicial Committee in 1829 down to 1897. These decisions appear to me to be consistent with the true rule of Hindu law as deducible from the authorities I have already examined. It is, however, I think, possible to show that the view indicated above not only represents the true rule of Hindu law, but is consistent with the rules of English law in similar matters.

Under the English law it is well-settled that a gift for the advancement of religion in general terms, as for instance, a gift to be employed "in the service of My Lord and Master" or "for the worship of God" are valid. In support of this proposition, reference may be made to the decisions in *In re Darling* (10) and *Attorney General v. Pearson* (11). In the former of these cases, reference is made to the decision of Lord Mannors in *Powerscourt v. Powerscourt* (12), the decision in which was followed in *Felan v. Russell* (13). In the second case, Lord Eldon observed that if lands or money were given in such a way as would be legal, notwithstanding the statutes concerning disposition of charitable uses, for the purposes of building

(1) (1829) 1 Knapp. 245.

(2) (1886) I. L. R. 14 Calc. 222.

(3) (1905) 9 C. W. N. 528.

(4) (1879) I. L. R. 5 Calc. 438;
 L. R. 6 I. A. 182.

(5) (1882) I. L. R. 8 Calc. 788.

(6) (1904) I. L. R. 31 Calc. 895.

(7) (1885) I. L. R. 9 Bom. 491.

(8) (1878) I. L. R. 12 Bom. 267n.

(9) (1897) I. L. R. 25 Calc. 112.

(10) [1896] 1 Ch. 50.

(11) (1817) 3 Mer. 353, 409;
 17 R. R. 100.

(12) (1824) 1 Molloy 616.

(13) (1842) 4 Ir. Eq. Rep. 701.

a church or a house or otherwise for the maintaining and propagating the worship of God, and if there were nothing more precise in the case, the Court of Chancery would execute such a trust by making a provision for maintaining and propagating the established religion of the country. This is in agreement with the view previously indicated by the Lord Chancellor in *Mills v. Farmer* (1), namely, that it is quite impossible to maintain the proposition that a gift to charity is to be construed as a legacy to an ordinary legatee who must be sufficiently pointed out and described. The case before us, in which no question of indefiniteness can possibly arise, consequently occupies a much stronger position.

It is further clear that, under the English law, a valid gift may be made to a charity not *in esse* at the time, but to come into existence at some uncertain time in the future, provided there is no gift of the property in the first instance, for the benefit of any private corporation or person, or perpetuity in a prior taker. One of the most recent decisions on the subject is that of *Wallis v. Solicitor-General for New Zealand* (2) which was heard on appeal by the Judicial Committee from New Zealand. In that case, certain Maori chiefs had in 1848 given 500 acres of land to the Bishop of New Zealand for a college to be erected thereon for the general purpose of promoting religion. Up to 1898, no college had been erected, and it was found that the land had in course of time become an unsuitable site, while the accumulation of its rent had amounted to a considerable sum. It was ruled that there was an express gift of land and money for charitable purposes, and that such a gift was not invalidated by the fact that the particular application directed could not immediately take effect or would not of necessity take effect within any defined limit of time and might never take effect at all. It was further held that the doctrine of *cy-pres* was applicable. Lord Macnaghten in his judgment relied in support of this proposition upon the decision of Lord Selborne in *Chamberlayne v. Brockett* (3). This,

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(1) (1815) 19 Ves. 482; 1 Mer. 55.

(2) [1903] App. Cas. 173.

(3) (1872) L. R. 8 Ch. App. 206.

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however, is only one of many instances in which the English Courts have affirmed this doctrine, and the cases where charitable gifts to non-existent corporations or societies have been sustained are really numerous. The leading case on the subject is that of the Downing College reported under the name of *Attorney General v. Downing* (1) and under the name of *Attorney General v. Bowyer* (2). Other cases in which the same rule has been affirmed are those of *Attorney General v. Bishop of Chester* (3), *Loscombe v. Wintringham* (4), *Attorney General v. Craven* (5), *Martin v. Maugham* (6), *Henshaw v. Atkinson* (7), *In re Clergy Society* (8), *In re Maguire* (9) and *Sinnett v. Herbert* (10). The Supreme Court of the United States has on several occasions affirmed the same doctrine after an elaborate review of the English decisions on the subject. *Inglis v. Sailors Snug Harbour* (11), *Trustees v. State* (12), *Ould v. Washington Hospital* (13), *Russell v. Allen* (14) and *Jones v. Habersham* (15). In the third and fourth of these cases, many of the decisions in England to which we have referred are minutely examined, and the rule is laid down that a gift for charitable uses is valid, even though it is in favour of a non-existent corporation or society. I refer to these English and American decisions not as authorities in any way binding upon this Court, but solely to illustrate the position that the conclusion at which we arrive upon a strict interpretation of the texts of Hindu law, is consonant with the principles which have been adopted independently in other systems of jurisprudence. We cannot overlook the fact that as pointed out in the case of *Trikam-*

(1) (1766) 2 Amb. 550, 571;

Wilm. 1; Dick 414.

(2) (1798) 3 Ves. Jun. 714;

(1800) 5 Ves. Jun. 300;

(1803) 8 Ves. 256.

(3) (1785) 1 Bro. C. R. 444.

(4) (1850) 13 Beav. 87; 51 E. R. 34.

(5) (1856) 21 Beav. 392;

52 E. R. 910.

(6) (1844) 14 Sim. 230;

60 E. R. 346.

(7) (1818) 3 Madd. 396.

(8) (1856) 2 Kay & J. 615;

69 E. R. 928.

(9) (1870) L. R. 9 Eq. 692.

(10) (1872) L. R. 7 Ch. App. 232

(11) (1830) 3 Peters 99, 114.

(12) (1852) 14 Howard 274.

(13) (1877) 95 U. S. 313.

(14) (1882) 107 U. S. 168.

(15) (1882) 107 U. S. 191.

das Damodhar v. Haridas Morarji (1), their Lordships of the Judicial Committee, when called upon to decide an analogous question in *Ranchordas Vandravandas v. Parvatibai* (2), placed considerable reliance upon the decisions of the English Courts in similar matters, although in that particular instance there is room for doubt whether the actual decision was, in view of the texts to which attention was invited by Sir Subrahmanya Ayyar in *Parthasarathy Pillai v. Thiruvengada Pillai* (3) quite in harmony with the true doctrine of Hindu jurisprudence.

To sum up :

(i) The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence at the time of death of the testator, is based upon a double fiction, namely, first, that a Hindu deity is for all purposes a juridical person, and secondly, that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated, and the second is inconsistent with the first principles of Hindu jurisprudence.

(ii) The Hindu law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra-commercium* and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments : *Manohar Ganesh Tambekar v. Lakhmiram Govindram* (4) affirmed, on appeal, by the Judicial Committee in *Chotalal Lakhmiram v. Manohar Ganesh Tambekar* (5). It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year.

On these grounds, I agree with the learned Chief Justice that both the questions referred to the Full Bench ought to be answered in the negative.

(1) (1907) I. L. R. 31 Bom. 583.

(4) (1887) I. L. R. 12 Bom. 247.

(2) (1899) I. L. R. 23 Bom. 725 ;

(5) (1899) I. L. R. 24 Bom. 50,

L. R. 26 I. A. 71.

L. R. 26 I. A. 199.

(3) (1907) I. L. R. 30 Mad. 340.

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COXE J. I agree with the learned Chief Justice.

CHATTERJEE J. The testator Umesh Chandra Lahiri died on the 28th June 1890 after having made a will on the 26th of June 1890. Amongst other matters the will provided,—
 “All my properties shall be placed in the hands of” Babus so and so “as trustees.” They were to give certain annuities, to defray the expenses of certain named relatives, to pay Rs. 10 per annum to his *guru* Hari Nath Bhattacharya and Rs. 5 to his *purohit* Sreesh Chandra Chakrabarti, to defray the cost of the worship of the family *Thakurs*. It also directed that “they shall spend the surplus income which may be left, in the *sheba* and worship of Kalee, after establishing the image of the Kalee after the name of my mother, *i.e.*, in the name of *Iswar Anandamoyee Kalee*.” “I further provide that if for any reason, the image of *Iswar Kalee Debee* is not established and if the income of my properties is not used for her *sheba* and worship, then my *gurudeb* and his sons, grandsons, etc., in succession, shall get my Rangpur properties and possess the same in absolute right from generation to generation with right to sell, etc.”

In accordance with the above direction, the executors established and consecrated, in the month of October or November 1894, an image of the Goddess made of earth, and later on, in the year 1894, replaced the same by one made of stone, and had a temple built for its location. They thus carried out the direction in the will, and the worship has ever since been carried on. On the 4th July 1904, the plaintiffs, who are the sons of the *guru* of the testator, brought the present suit for the construction of the will, for a declaration that the trust for the establishment and consecration of the image of Goddess Kalee and her worship was void, for possession of the Rangpur properties and for an account and mesne profits. The Court of first instance held that the bequest in favour of the Goddess Kalee was valid, and dismissed the suit. On appeal by the plaintiffs the Division Bench, disagreeing with

the case of *Upendra Lal Borol v. Hem Chundra Borol* (1) and some later cases which followed the same, referred the following questions for the decision of the Full Bench :—

(i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void ?

(ii) Whether the cases of *Upendra Lal Borol v. Hem Chundra Borol* (1), *Rojomoyee Dassee v. Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dassi v. Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void ?

The cases mentioned in the order of reference are all, more or less, based on the decision of the Privy Council in the great *Tagore case* (4). The said case was in respect of a gift to a human being and was based on a passage in the *Dayabhaga*, Chapter I, para. 21, which is to the following effect :—

२१। अथ व्यापारिणां च स्वयमविरुद्धं शास्त्रमुक्तवादस्य। इदञ्च लोकेऽपि दाने हि चेतनोद्देशविशिष्टत्वात् दानं दानस्यापारात् सम्प्रदानस्य द्रव्ये स्थानितं।

“The right of one may consistently arise from the act of another : for an express passage of law is authority for it ; and that is actually seen in the world, since, in the case of donation, the donee's right to the thing arises from the act of the giver, namely, from his relinquishment in favour of the donee who is a sentient person.”

Colebrooke's translation.

The next paras. 22 and 23 go on to say that the title of the donee accrues before the acceptance and para. 24 says that the acceptance makes the title which has already accrued capable of full enjoyment, thus differing from the *Mitakshara* which holds that title does not accrue before acceptance. The author is here incidentally dealing with the meaning of the word gift and does not make any further refer-

(1) (1897) I. L. R. 25 Calc. 405.

(2) (1901) I. L. R. 29 Calc. 260.

(3) (1902) I. L. R. 30 Calc. 521.

(4) (1872) 9 B. L. R. 377 ; 18 W. R. 353 ; L. R. I. A. Sup. Vol. 47.

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ence to the subject. Of the commentators on the Dayabhaga, Sreenath says चेतनपदं चेतनविशेषपरं अतो न द्रागं गवादि पुजायाश्च ति प्रसक्तिः "the word 'sentient' is spoken of, of some particular sentient being and the definition of gift is not wide enough to include *jaga* (or gift in favour of a deity) or the worship of a cow, etc. (to which things are given)." Achyutananda says व्यागमात्रं द्रव्यं त्सर्गादावति प्रसक्तमत आह चेतनेति : "simple व्याग or relinquishment would be wide enough to include the dedication of the sacred bull, etc., and therefore the word 'sentient' is used." Sreekrishna Tarkalankar also says व्यागमात्रात् द्रव्योत्सर्गादि कृपात् स्वामित्वा-जननादाह चेतनोद्देशेति : "as in the dedication of the sacred bull no title to the same accrues to any one, the word *tyaga* or relinquishment is spoken of in reference to a sentient being."

All these commentators, therefore, understand the definition as limited to secular gifts as contradistinguished from gifts of the nature of *jaga*, which is a technical word meaning दैवतोद्देशेन द्रव्यव्यागः (1) "or relinquishment of property intended for a deity or other religious dedications, such as that of the sacred bull at a *sradh*." The subject of *dana* or gift, however, is dealt with in some detail by Narada in the chapter on the subtraction of gifts, and in making a subdivision he says :— "In civil affairs the law of gift is fourfold—(i) what may be given, (ii) what may not be given, (iii) what is given or a valid gift, (iv) what is not given or invalid gifts. Colebrooke's Dig., Vol. I, page 401. In commenting on the above, Jagannath Tarkapanchanan says :—"the rule to be established that gifts made by a man afflicted with disease and the like are void, regards civil gifts not donations for a religious purpose. This title of law does not extend to a gift made for a religious purpose : the donation is valid if it be made by the owner of the thing." Jagannath then quotes the text of कात्यायन (Katyayana) :—

सुखेनाच्चेन यद्वत् अविं चर्षकारणात् अदृष्ट्वात् चेतोदायस्तत्सुतीनाच संशयः
"What a man has promised in health or in sickness for a religious purpose must be given ; and if he die without giving it, his son shall doubtless be compelled to deliver it."

(1) *Sradhabibeka*, Chandi Charan's Ed. p. 18.

The same text is quoted with approval by the Vivada Ratnakar : see page 136, Bibliotheca Indica Series, where the author, in commenting upon another text of Katyayana as to invalid gifts, says आर्त्तेन दत्तं धर्मकार्यसम्पन्नं, *i.e.*, "gift by a person affected with disease (being invalid) must apply to gifts other than those made for a religious purpose." Raghunandan in his शुद्धितत्त्व (1) (Shuddhitatwa) quotes the same text of Katyayana and says एवञ्च सुमूर्धं दत्तस्य यदानोपसर्गत्वानिधानं तद्वर्त्तितरदानपरं, *i.e.*, "in the same way the inclusion of a gift by a dying person among invalid gifts has reference to gifts made for other than religious purposes." See also Vyavastha Darpan, 3rd Edition—Vyavastha 713, page 623 (Part I), and the authorities quoted.

It appears that the word दान or gift, when spoken of in respect of the deity, is used in a गौण or भाक्त, *i.e.*, secondary or figurative sense. The Sradhabibeka of Shoolapani says आदित्यादि देवता सम्यदानकदानेन दानशब्दो गौणः तद्वर्त्तितरदानाद्यतिदेशार्थः, *i.e.*, (2) "the use of the word दान or gift in respect of a gift to the Sun and other Gods is secondary or figurative and intended to signify, by analogy, the giving of the fee in either case." Sreekrishna Tarkalankar, the great commentator of the Dayabhaga, in his commentary on the above passage, says तथाचान् स्वस्वामिभावरूपं सम्बन्धवाधात् सुखप्रयोजनो न सम्बन्धिव, *i.e.*, "here also the use of the word in its primary sense is impossible, as there is no sense of one's own ownership" (like that of the donee in a secular gift).

Medhatithi, the great commentator of Manu, in commenting upon the word *devaswam* (god-property) in Manu, Chapter XI, Section 26, says देवानुद्दिश्य यागादिक्रियार्थं धनं यदुत्कृष्टं तद्देवस्वं सुखसा स्वस्वामि मरुत्स्य देवानास सम्भवात् नहि देवता इच्छया धनं नियुज्यते न च परिपालनञ्चापार सासां दृश्यते, *i.e.*, "Property that is relinquished in favour of Gods for sacrifices in their honour is called god-property, by reason of the impossibility of the application to Gods of the (ordinary) relation of owner and thing owned. For the Gods do not use the property according to their pleasure, nor do we see them exerting for the protection of the same."

(1) Bangabasi Edition, p. 498.

(2) Sradhabibeka, Chandi Charan's Ed. p. 22

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Again ननु चतुर्भुजादि प्रतिमा सत्त्वन्धि लोके देवसमुच्यते, लोक प्रसिद्धा शब्दाः शास्त्रे भूहीतुं नायः स्यादेव यदि देवसुशब्दो निर्भागः प्रसिद्धिमुपेयात्, देवानां स्व देवसमित्यवयव प्रसिद्धौ समुदाधार्यः प्रकटः न च वाक्यान्तर प्रकल्पना प्रमाणेनाप्यलि। मुख्यं चतुर्भुजादीनां देवत्वं प्रतिमाव्यवहारविषयापहतं न च यद्युक्तवचनमस्ति; अथ समाचारतो देवत्वं भवतु स्वस्वामि भाव स्थावरास्ति यद्योक्तेन च प्रकारेण स्व व्यवहारोपपत्तिरिति शिष्टं द्वितीयं “It cannot be argued that in popular view (property relating to the four-armed or the like *image* of God) is called ‘god-property,’ and it is proper to put the popular meaning on words occurring in the *shastras*. It would be so if the term ‘god-property’ acquired notoriety (in that sense) as a single undivided word; but by reason of the notorious meaning of the component parts of the word, namely, God and property, the meaning of the whole, that is, God’s property is god-property, is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning. The assumption that the four-armed and the like have the status of God in the primary sense is removed by the very use of the term *image*. Nor can it be argued that although there is no God in the primary sense in such cases, still let such property be god-property by usage. Be it so, but there cannot be the relation of owner and thing owned. The use of the term property (as God’s) may be reconciled in the manner stated. This is discussed in the second Chapter of the *Mimamsa* of Jaimini.” Kullooka Bhatta, in his commentary on the same words, says: प्रतिमादि देवार्थमुत्पद्यते धनं देवस्य, i.e., “the property dedicated for the images and other deities is called *devaswam*.” It would appear sufficiently clear from the authorities that the definition of gift referred to by the *Dayabhaga*, Chapter I, Section 21, is in respect of a secular gift and not a gift for religious purpose. This disposes of the applicability of the *Tagore case* (1) and also the case of *Bai Motichahu v. Bai Mamulai* (2), which latter case may be further distinguished as being governed by the *Mitakshara* law.

Even if we were to apply the definition, as given in the above text of the *Dayabhaga*, to such a gift, it would seem

(1) (1872) 9 B. L. R. 377; 18 W. R. (2) (1897) I. L. R. 21 Bom. 709; 359; L. R. I. A. Sup. Vol. 47. I. L. R. 24 I. A. 93.

absurd to say that a deity is not a sentient being. If the deity exists and it manifests itself in the image upon the invocation of the worshipper with certain *mantras*, it cannot be said to be an insentient being. If it answers to the इहागच्छ इदिति. i.e., "come here", "stay here" of the votary, it cannot be said to be insentient. The text—

विष्णुसमादितीयसा निष्कलसाशरीरिणः ।

उपासकानां काश्चिन्नक्षत्रा रूपकल्पना ॥ रघुनन्दन—प्रतिष्ठातव्य

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"For the use or benefit of the votary Brahman or God, although only existing in spirit and without a second, having no attribute and no body, assumes forms." Shastri's Hindu Law, 3rd Ed., page 420, shows the Hindu idea of the forms attributed to God for the convenience of worship. A particular image may be insentient until consecrated, but the deity is not. If the image is broken or lost, another may be substituted in its place and, when so substituted, it is not a new personality, but the same deity and properties previously vested in the lost or mutilated *Thakur* become vested in the substituted *Thakur*. A Hindu does not worship the "idol" or the material body made of clay or gold or other substance, as a mere glance at the *mantras* and prayers will show. They worship the eternal spirit of the deity or certain attributes of the same, in a suggestive form, which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the *mantras* peculiar to a particular deity that causes the manifestation or presence of the deity or, according to some, the gratification of the deity. According to either view, it is the relinquishment of property, in the name of the deity, for securing its gratification, that completes the gift, and such relinquishments are valid according to Hindu law, even if made by a dying man. It may be true that the illiterate Hindu thinks of the consecrated symbol as the deity and has not any clear idea of the particular attribute of the God-head, that is worshipped in a particular form, but it cannot be said with any approach to truth that the great Rishis and their commentators who declared the Hindu law had such a gross idea of the divinity they worshipped. In this view of the

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case also, the text of the Dayabhaga relied on in the *Tagore case* (1) cannot invalidate the gift in favour of a deity whose image is consecrated after the death of the donor.

Then again, their Lordships of the Judicial Committee, in the *Tagore case* (1) say that the object of the donation must be in existence, at least in contemplation of law, and as an instance, the case of an adopted son is mentioned, as, by a fiction of law, he is supposed to have been conceived during the lifetime of the adoptive father. It is contended that Anandamoyee Kalee was not in existence during the lifetime of the testator, although the Goddess Kalee was, is and always will be in existence. Suppose a Hindu gives permission to his wife to adopt a son after his death and to name him by a particular name: 'Ram,' 'Syam' or 'Gopal.' It cannot be contended with any semblance of reason that a son adopted by the widow and named as directed by the adoptive father would not be validly adopted, because a son of that particular name could not be supposed to have been conceived by relation back to the lifetime of the father. It is not necessary to apply the same analogy in the case of a deity, as the reasons hereinbefore enumerated will show, but if it were necessary, there would be no difficulty to the Hindu lawyer to call it in aid in favour of the gift.

I have stated above that in the case of a gift to a God, the relation of an owner to the thing owned in its primary sense is considered to be wanting. Who then is the owner of the property? In a secondary sense, no doubt, the deity is the owner, but the *shastras* lay down देवे दियाणि दानानि, देवे दद्याच्च दक्षिणां तत् सर्वं ब्राह्मणेदद्यादव्यया निष्कलं भवेत्, i.e., "Gifts are to be given to the deity and the fee for the acceptance of the gift also is to be given to the deity, but all these are to be (ultimately) given to a Brahman, otherwise the gift would be useless."

Matsya Sooktam quoted by Raghunandan in his *Shuddhitatwa* (2).

Every gift, therefore, in favour of a deity is a gift for the ultimate benefit of a Brahman or Brahman, and may, there-

(1) (1872) 9 B. L. R. 377; 18 W. R. (2) *Suddhitatwa*, Bang. Ed. p. 557.
359; L. R. I. A. Sup. Vol. 47.

fore, be looked upon as a charitable gift. It was held by Sir Raymond West in the case of *Monohar Ganesh Tambekar v. Lakhmiram Govindram* (1) that a trust for a Hindu God and temple was one created for public charitable purposes. The God and temple, in that case, was a public one and the trust was, therefore, considered to be a public one. There is no reason why the gift in this case, which is expressly vested in trustees for the purpose of building a private temple and setting up a private diety, should not be considered a private charitable trust—'charitable' I say because the ultimate benefit must come to the *pujaris* and *shebaks*. "It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as *shebait* or manager:" *Prosunno Kumari Debia v. Golap Chand Baboo* (2). And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the *shebait*, not in the idol: *Jagadindra Nath Roy v. Hemanta Kumari Debi* (3). Again, bequests for the performance of the periodical *poojas* of Durga, Kalee, etc., or for the celebration of the periodical festivals, called Dolejatra, Rashjatra, etc., have been from very old times given effect to by our Courts. Instances will be found in the following cases:—

Ramtonoo Mullick v. Ramgopaul Mullick (4), *Ashutosh Dutt v. Doorga Churn Chatterjee* (5), *Hemangini Dasi v. Nobin Chand Ghose* (6), *Gokool Nath Guha v. Issur Lochun Roy* (7), *Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen* (8), *Bisseswar Prasanna Sen v. Bhagabati Prasanna Sen* (9), *Prafulla Chunder Mullick v. Jogendra Nath Sreemany* (10),

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(1) (1887) I. L. R. 12 Bom. 247, 263. (5) (1879) I. L. R. 5 Calc. 438;

(2) (1875) 14 B. L. R. 450; 23 W. R. L. R. 6 I. A. 182.

253; L. R. 2 I. A. 145, 152. (6) (1882) I. L. R. 8 Calc. 788.

(3) (1904) I. L. R. 32 Calc. 129; (7) (1886) I. L. R. 14 Calc. 222.

L. R. 31 I. A. 203. (8) (1897) I. L. R. 25 Calc. 112.

(4) (1829) 1 Knapp. 45. (9) (1906) 3 C. L. J. 606.

(10) (1905) 9 C. W. N. 528.

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Jairam Narronji v. Kuverbai (1) and *Manohar Ganesh Tambekar v. Lakhmiram Govindram* (2).

If a gift in favour of a deity, whose image has to be prepared and destroyed periodically, is valid, I do not see any reason why a gift in favour of a deity, whose image is to be prepared once for all, except for any reason for reconstruction coming to pass, should be invalid.

In the present case again, the testator does not expressly make a gift to Kalee or Anandamoyee Kalee. He only vests his properties in certain trustees who are to employ the surplus income of his properties in a certain way, by spending the same in the establishment, *sheba* and *pooja* of the Goddess Kalee under the name and style of *Isvar Anandamoyee Kalee*. I do not see how the rules of gift to a deity, even if they were not as I have stated above, can invalidate the bequest in this case. For the reasons stated above, I would answer both the questions referred in the negative.

PER CURIAM. The order of the Court accordingly is that the case be returned to the Division Bench to decide the matter in accordance with the opinion we have expressed.

Case remanded.

S. M.

(1) (1885) I. L. R. 9 Bom. 491.

(2) (1887) I. L. R. 12 Bom. 247.

APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

JADAB GOBINDA SINGH

v.

ANATH BANDHU SAHA.*

1909
May 17.

*Remand—Parties, addition of—Civil Procedure Code (Act XIV of 1882) s. 564—
Order of remand by Appellate Court directing addition of party, whether legal.*

An order of remand under section 564 of the Civil Procedure Code (Act XIV of 1882) by the Appellate Court, directing addition of parties, is an order upon a preliminary point, and, as such, is not illegal.

Habib Bakhsh v. Baldeo Prasad (1) followed.

SECOND APPEAL by the defendants, Jadab Gobinda Singh and another.

This appeal arose out of an action brought by the plaintiff to recover arrears of rent due from the defendants. It appeared that the plaintiff was the four annas shareholder of a certain property, and the remaining twelve annas share was owned by the defendants. In the year 1891 there was a partition of the said property, and by that, *sahams* Nos. 8 and 9 were allotted to the plaintiff, who took possession of these *sahams* in the year 1306. Subsequently, the present action was brought by the plaintiff for apportionment of the rent. The plaintiff did not make all the co-sharers and some of the tenants, who had interest in the holding, parties to the suit. The Court of first instance passed a modified decree. On appeal, the learned District Judge remitted the case to the Munsif, with a direction to make those persons parties to the suit and to take certain other action.

* Appeals from Appellate Orders, Nos. 318 and 324 of 1907, against the orders of S. N. Huda, District Judge of Farnabadi and Bogra, dated April 23, 1907, reversing the orders of Kamala Nath Das, Munsif of Farnabadi, dated Sept. 17, 1906.

(1) (1901) I. L. R. 23 All. 167.

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Against this decision two of the defendants appealed to the High Court.

Babu Hara Chunder Chuckerbutty, for the appellants.

Babu Braja Lal Chuckerbutty, for the respondent.

SHARFUDDIN AND COXE JJ. The defendants in this case were originally tenants jointly under the plaintiff and his co-sharers. The plaintiff and his co-sharers partitioned their property, and the result was that some portions of the holdings of the various tenants fell into the plaintiff's share and others into the shares of his co-sharers. The plaintiff accordingly sued for apportionment of the rent. The Munsif gave him a modified decree. But on appeal to the District Judge, he noted that it was admitted on behalf of the plaintiff that all the co-sharer proprietors, and also some other persons who were interested in the land, had not been made parties. He, therefore, remitted the suits to the Munsif, with a direction to make these persons parties and to take certain other action.

Two of the defendants have appealed to this Court, and it is argued on their behalf that this order of remand was illegal under section 564 of the old Code. It may be conceded that the Munsif did not dispose of the suit upon a preliminary point, for this question, whether all the co-proprietors had been made parties, does not appear to have been raised before him. But the order of the District Judge directing the addition of parties is an order upon a point which is necessarily preliminary to the proper decision and trial of the suit.

As against the added parties, the proceedings begin only on the service of summons, and they are, we think, entitled to have their case investigated and decided by the Munsif. We think, therefore, that the order of the District Judge is not illegal, and in this view we are supported by the decision in the case of *Habib Bakhsh v. Baldeo Prasad* (1).

The appeals are accordingly dismissed with costs.

Appeals dismissed.

S. C. G.

CIVIL REFERENCE.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Chitty and Mr. Justice Vincent.

ABINASH CHANDRA MOITRA, *In re*.*

1909
Aug. 17.

Practice—Jurisdiction—Legal Practitioners' Act (XVIII of 1879) ss. 13, 14—Division Bench, jurisdiction of, to hear reference under the Act from subordinate Courts.

According to a long and undeviating course of practice, which may be regarded as the law of the Court, a Division Bench appointed to dispose of the civil business arising out of a particular Group, has power to hear and dispose of a reference, under section 14 of the Legal Practitioners' Act, by the presiding officer of a Court within that Group.

REFERENCE in the matter of Abinash Chandra Moitra, a pleader, under the Legal Practitioners' Act, 1879.

Abinash Chandra Moitra was enrolled as a pleader in the District Court of Faridpur in 1893. The District Judge of Faridpur having held that a charge of grossly improper conduct in the discharge of his professional duties was proved against him, made a reference to the High Court under section 14 of the Legal Practitioners' Act, recommending that he be either dismissed or subjected to such other punishment as may be deemed proper by the High Court.

The matter came on for disposal before Chitty and Vincent JJ., the Judges presiding over the Presidency Group to which the district of Faridpur belonged. Their Lordships having agreed with the learned District Judge ordered that the said pleader be dismissed.

Thereupon, Abinash Chandra Moitra applied to the Chief Justice to form a Bench for hearing the application, on the ground of an illegal exercise of jurisdiction under the Legal Practitioners' Act, and then, after hearing it, to appoint a Bench to dispose of the case. The application was made with a request that it might be dealt with administratively.

* Civil Reference No. 1 of 1909, by the District Judge of Faridpur.

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The following order was passed by the Chief Justice dismissing the application :—

JENKINS C.J. This is an application by way of petition, whereby it is prayed that I will “form a Bench for hearing the application, and then, after hearing it, appoint a Bench to dispose of the case,” to which the petition relates, “legally as a matter which has not been legally disposed of, and to pass any other order as may be deemed fit and proper.”

The application has been brought before me as Chief Justice, with a request that I will deal with it administratively.

In July 1893 the applicant was enrolled as a pleader in the District Court of Faridpur, where he practised by virtue of a certificate granted under the Legal Practitioners' Act. The District Judge finding that a charge of professional misconduct was established against the applicant, reported the same to the High Court.

The case came before Mr. Justice Chitty and Mr. Justice Vincent, who at that time constituted the Divisional Court appointed to deal with the business of the Presidency Group to which the District of Faridpur belongs. The order passed by the Division Court was that the application be dismissed. The applicant now contends that the case did not fall within the jurisdiction of the Division Court so constituted, and submits that “it had been empowered by the Rules of the High Court only to exercise Appellate Civil Jurisdiction and to hear references from the subordinate Courts of the Presidency Group, and not to exercise the Court's disciplinary jurisdiction given by the Legal Practitioners' Act.” Though the applicant was represented by counsel before the Division Court, no exception was taken to its jurisdiction, and it is conceded that had this particular Division Court been specially nominated by the Chief Justice to deal with this case, no objection could now be raised. I have consulted the officers of the Court and find that, in accordance with a practice that has obtained ever since the passing of the Act, 1879, each Division Court has dealt with all cases of this kind coming from districts of the

group in its charge ; and this has been done by virtue of the determination of the Chief Justice for the time being expressed in terms identical with those in obedience to which this case was placed before the Division Court whose jurisdiction is now questioned. Seeing that I am only invited to deal with this matter administratively, it is not open to me to hold that what has been done by the Division Court is a mere nullity which can be regarded by me as though it had no existence.

The Division Court has acted under a direction which has always been treated as a sufficient allocation of cases arising under the Legal Practitioners' Act.

The intention to allocate is beyond doubt ; the question is whether the language is apt to carry out this intention. The long and undeviating course of the Court must, for the purpose of this application, be regarded as a sufficient answer ; and in the circumstances the practice of the Court may justly be regarded as the law of the Court. Moreover, if the proceeding before the Division Court be the nullity for which the applicant before me contends, and is forced to contend, then the order made is followed by no legal consequences against him, and in any case he has his remedy by way of appeal to His Majesty in Council. In the circumstances, I must reject the present application.

The application having thus been disposed of by his Lordship the Chief Justice, the petitioner made another application for review of judgment to Chitty and Vincent JJ., the learned Judges who presided over the Presidency Group and formerly disposed of the matter.

Mr. A. Chaudhuri, Mr. K. N. Chaudhuri, Babu Kishori Lal Sarkar and Babu Debendra Nath Bagchi, for the petitioner.

CHITTY AND VINCENT JJ. This is an application to us to review our judgment of the 28th May 1909, by which we ordered the dismissal of the pleader, Abinash Chandra Moitra, who was charged with professional misconduct. The petition for review contains eight grounds, but none of these have been

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seriously pressed by the learned counsel for the applicant. The first ground that the District Judge had no jurisdiction to hold the enquiry and report was given up. The learned counsel did suggest that we had taken an erroneous view of the facts in one or two unimportant respects, principally with regard to the withdrawal of the suit against Bahadur Mollah by Abinash Chandra Moitra ; but after hearing his arguments with regard to those points, we do not see any reason to go back upon the conclusions at which we arrived.

The main ground which was urged before us was that this Division Bench was not properly constituted and authorised to deal with this reference. It was suggested that this might be covered by the concluding words of the first ground, but it is evident that that ground refers solely to the jurisdiction of the District Judge to make the reference. We permitted the learned counsel, however, to say what he had to say on the point, and will now deal with it. It is argued that the Charter gives the High Court jurisdiction over only the vakils of the High Court and not over pleaders in the mofussil. That jurisdiction, it is said, is conferred only by the Legal Practitioners' Act, 1879, and can only be exercised in conformity with the provisions of that Act. Under section 14 a report may be made by certain officers therein named to the High Court, and it is for the High Court to say whether the pleader shall be acquitted, suspended, or dismissed. It is argued that the High Court means the whole body of the Chief Justice and Judges, or such of them as have been authorised by rule or special order to deal with the matter. It was contended before us that the arrangement could be made only by the Full Court and not by the Chief Justice. But we find from the judgment of the learned Chief Justice, delivered when the matter was brought before him in his administrative capacity, that it was conceded before him that had this particular Division Court been specially nominated by the Chief Justice to deal with this case, no objection could have been raised. It thus appears that the same counsel for the same client adopted on the two occasions opposite lines of argument.

Before us it is conceded that for the past 30 years such references have been invariably dealt with by the Bench disposing of the civil business arising out of the group from a district of which the reference comes. It is argued that this assumption of jurisdiction cannot confer jurisdiction, and that, unless authorised by the Full Court, a Division Bench has no Jurisdiction to deal with such a reference. It is to be noted that although this reference was argued before us on two occasions (the 30th and 31st of March and the 17th of May last) by two different counsel for the applicant, no suggestion was made that we had no power to deal with the matter; nor, indeed, was any such suggestion made in the application for review. It is true that up till now there has been no framed rule of this Court expressly allotting such matters to any particular Bench; but the practice of the past 30 years has been uniform, and has been well-known to the profession. It is not precisely a question of jurisdiction, for undoubtedly the High Court has jurisdiction in the matter, but rather a question whether this particular Division Bench represented the High Court for the purpose. We do not feel disposed to entertain the suggestion, made at this late stage, that this Bench was altogether without jurisdiction, and that the proceedings before us are null and void. There is nothing, so far as we are aware, which requires these matters to be allocated to a Bench or Benches by a written rule or order, and we think that the established practice of 30 years, which is unquestioned, gave a sufficient authority, whether it be considered to emanate from the Full Court or from the Chief Justice.

The learned counsel concluded with an appeal *ad misericordiam*. The sentence, he said, was too severe, and he pleaded for its reduction to a period of suspension. It was said that the pleader had in fact paid up the money which he was charged with having misappropriated. We allowed time for evidence of such payment to be produced, and required that it should be verified by the affidavit of the pleader of Monorama, to whom the payment was alleged to have been made. Two receipts purporting to be given by that pleader have been produced,

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but the affidavit in support is not sworn by the pleader to whom payment was made, not even by Abinash Chandra Moitra himself, but by his younger brother. The payments are said to have been made, Rs. 75 on the 9th December 1908, and the balance, Rs. 87-15-8, on 10th August 1909, that is *after* we heard counsel on the petition for review. This is most unsatisfactory. It is incredible that if the Rs. 75 had been paid, as alleged, last December, it should not have been stated at one or other of the hearings before us, especially as we laid stress on the fact that up to now nothing had been paid. The payment said to have been made last week after we were told that it had been paid does not improve matters.

At the same time we have no wish to press too hardly on the applicant. His offence is a very serious one and cannot be lightly regarded, and we adhere to the conclusions which we stated in our judgment; but after giving the appeal of his counsel our best consideration, we think the justice of the case will perhaps be met by an order of suspension. We accordingly revoke the order of dismissal and order that Abinash Chandra Moitra be suspended for four years, to commence from the date when he was first suspended by the District Judge.

S. C. G.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Vincent.

NIMAI CHAND ADDYA

v.

GOLAM HOSSEIN.*

1909

Aug. 24.

Mahomedan Law—Endowment—Waqf—Mortgage of waqf property by Mutwalli for necessity of urgent character, whether valid—Effect of obtaining permission of Cadi after the mortgage—Loan by a trustee at a high rate of interest.

Under the Mahomedan Law, mortgage of *waqf* property by the *mutwalli* in case where necessity is established is valid, even if the permission of the Cadi is obtained subsequent to the mortgage.

Where, therefore, a Court found that a mortgage by a *mutwalli* of *waqf* properties was for urgent necessity and that the mortgage was proper, the mortgage is valid in law, inasmuch as it might be taken to have been retrospectively approved by the Court.

A loan by a trustee of endowed property at the rate of interest at 12 per cent. per annum with quarterly rests, could not be considered beneficial to the endowment, although the principal sum itself might have been urgently raised for the protection of the endowment; and in such a case the Court is justified in allowing interest at a reduced rate.

APPEAL by the plaintiffs, Nimai Chand Addya and others.

This appeal arose out of an action brought by the plaintiffs to enforce two mortgage bonds executed by the defendant No. 1, on the 10th of May 1895, in favour of one Ishan Chandra Addya. One of these bonds was for Rs. 1,000, and it appeared that defendant No. 1, who was a *mutwalli*, in order to save *waqf* properties which were put up for sale by Government for costs incurred in a partition proceeding, hypothecated the said properties, borrowed the said sum of Rs. 1,000 from the late Ishan Chandra Addya, deceased father of the plaintiffs, and thus saved the property from being sold. No question arose in the present appeal as to the other bond.

The defendant pleaded, *inter alia*, that according to the provisions of the *waqfnama*, the *mutwalli* had no authority to

* Appeal from Original Decree, No. 376 of 1907, against the decree of Kishori Lal Sen, Subordinate Judge of Dacca, dated June 29, 1907.

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mortgage the *waqf* properties, and that, therefore, the plaintiff could not get any benefit on the basis of the aforesaid mortgage bond.

The Court of first instance held that although the mortgage was executed for legal necessity, yet inasmuch as it was not done with the sanction of the Cadi previously obtained, the mortgage was not a valid one, and it dismissed the plaintiffs' suit.

Against this decision the plaintiffs preferred this appeal to the High Court.

Babu Basanta Kumar Bose (with him *Babu Sarat Chandra Ghose*), for the appellants.

Moulvie Z. R. Zahid, for the respondents.

MOOKERJEE AND VINCENT JJ. This appeal is directed against the decree in a suit to enforce two mortgage securities executed by the first defendant on the 10th May 1895 in favour of one Ishan Chandra Addya, now represented by the plaintiffs-appellants. One of these bonds was for Rs. 1,500 and the other for Rs. 1,000. No question arises in the present appeal as to the first of these two bonds. As regards the second bond, one of the properties included in it was covered by a deed of *waqf* executed on the 29th August 1862, under which the mortgagor was made a *mutawalli*. The question in controversy between the parties relates to the validity of the mortgage in respect of the *waqf* property. The circumstances under which the *waqf* property was given in mortgage are not disputed. The properties included in the deed of *waqf* were zemindaries liable to be partitioned under the Estates Partition Act. In 1894, one of the co-sharers in the property commenced proceedings under that Act. The estate was partitioned and the *waqf* properties were made liable for the payment of Rs. 1,275 as the proportionate share of the cost of partition. The Government took statutory steps for realization of this sum, and as the *mutawalli* found it impossible to satisfy the demand from the current income of the properties, the Collector fixed the

10th May 1895 for the sale of the estate. Under these circumstances, the *mutawalli* effected a mortgage of his own properties and a portion of the *waqf* estate, raised a loan of Rs. 1,000 and applied the sum to avert the impending sale. There is no room for dispute, therefore, that the mortgage was created under the gravest necessity of the most urgent character, and that but for the action taken by the *mutawalli*, the estate would have been unquestionably sold and the *waqf* destroyed. The Subordinate Judge has held that although these facts are not and cannot be disputed, the mortgage is, upon the authority of the decision of this Court in *Shama Churn Roy v. Abdul Kabeer* (1), absolutely null and void, and that the mortgagee is not entitled to proceed in any manner against the *waqf* properties included in the mortgage for the satisfaction of his dues. This position has been controverted before us in appeal. The question raised is one of considerable importance, and to determine accurately the rights of the respective parties, it is necessary to examine the leading texts on the subject of alienations of *waqf* properties, to be found in the writings of Mahomedan jurists of recognised authority. We proceed to give an English version of these texts, of which the originals are appended to this judgment for facility of reference.

TEXT I.

فتاویٰ قاضی خان جلد ۴

[صفحہ ۲۱۸]

و لو ان القیم اراد ان یرهن الوقف بدین لا یصح - لان فی ذلك تعطیل الوقف - و كما لا یصح ذلك من المتولی - لا یصح من اهل المسجد ایضا * فان رهن القیم دارا للوقف - و سكن المرتین فیها - قالوا یجب علیه اجر المثل - سواء كانت الدار معدة للاستغلال - او لم تكن احتیاطاً لامر الوقف *

If a *mutawalli* wishes to mortgage or pledge the *waqf* property as security for loan, it is not valid, because such a course

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would render the *waqf* useless. Neither the *mutawalli* nor the people who frequent the mosque (that is the beneficiaries) can validly do so. If a *mutawalli* mortgages a house belonging to the *waqf*, and the mortgagee dwells in it, the jurists are of opinion that the latter is bound to pay customary rent (literally rent of a similar property) whether the house be in a condition to yield an income or not. This should be done as a measure to safeguard the *waqf*. (Fatawa Qadi Khan, A.D. 1196, Calcutta Edition 1835, Volume 4, page 218.)

TEXT II.

[جلد ۴ - صفحہ ۲۲۱]

ان لم يكن للوقف غلة في يد القيم - رفعوا الامر الى القاضي -
ليأمر القاضي القيم بالاستدانة على الوقف في اصلاح الوقف - وليس
للقيم ان يستدين بغير امر القاضي - و تفسير الاستدانة - ان لا يكون
لوقف غلة - فيحتاج الى القرض و الاستدانة *

If the *waqf* property has no money (literally income, profits, etc.) in the hands of the *mutawalli* the matter should be referred to the Cadi, so that the Cadi may order the *mutawalli* to borrow on (the security of) the *waqf* for the benefit of the *waqf*. The *mutawalli* may not borrow without the sanction of the Cadi. The circumstances which justify the borrowing arise when there is no income from the *waqf* property, thereby necessitating borrowing and contracting a loan. (Fatawa Qadi Khan, Volume 4, page 221.)

TEXT III.

هدايه جلد ثاني

[صفحہ ۸۸۸]

قول النبي عم لعمر رضي الله عنه - حين اراد ان يتصدق بارض له
تدعى ثمغ تصدق باصلها - لا تباع و لا تورث و لا توهب *

The saying of the Prophet addressed to Umar when he wanted to appropriate a piece of land belonging to him and

called *Thamgh* "dedicate its corpus (asl), it shall not be sold nor inherited nor given away as a gift." (Hidayah by Burhan-al-din, A.D. 1197, Calcutta Edition, Volume II, page 888.)

TEXT IV.

[صفحہ ۸۹۷]

إذا صح الوقف لم يجوز بيعه - ولا نملكه *

When a valid *waqf* is made, its sale and transfer are not permitted. (Hidayah, Volume II, page 897.)

TEXT V.

[صفحہ ۹۰۷]

عن محمد رحمه الله - انه لا يباع ولا يورث ولا يوهب *

It is reported from Imam Muhammad that it (*waqf* property) cannot be sold, inherited, nor given away as a gift. (Hidayah, Volume II, page 907.)

TEXT VI.

اسعاف

[صفحہ ۱۴۷]

لو طلب من القيم خراج الوقف والجباية - وليس في يده شيء من الغلة - قال الفقيه أبو القاسم - ان كان الواقف أمراً بالاستدانة - جاز والا كان ذلك في ماله - ولا يرجع به في غلته وقال الفقيه أبو الليث - اذا استقبله أمر - ولم يجد بدا من الاستدانة - ينبغي له ان يستدين بأمر الحاكم - ثم يرجع به في غلة الوقف - لان للقاضي ولاية الاستدانة على الوقف *

If the *mutawalli* is called upon to pay the land tax (*khiraj*) and tribute (*jibayah*) due from the *waqf* property, and he has not in his hands anything out of the income of the *waqf*, the juriconsult Abu-l-Qasim says that it is lawful for him to

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borrow if the appropriator has authorised him to do so ; otherwise he shall have to pay (that is, the debt incurred without the authority of the appropriator) out of his own property and not out of the income of the *waqf*. The juriconsult Abu-Layth says that, when the *mutawalli* is confronted with an affair which makes it indispensable for him to borrow, he should do so with the sanction of the *hakim*, and then pay off the debt out of the income of the *waqf*, because the Cadi has the power of authorising the *mutawalli* to borrow on (the security of) the *waqf*. (Is'af by al-Tarabulusi, A.D. 1576, Cairo Edition, page 47.)

TEXT VII.

فتاوى عالمگیری

[جلد ثانی - صفحہ ۵۱۹]

المستولي إذا أراد أن يستدين على الوقف - ليجعل ذلك في
ثمن الرهن فإن كان بامر القاضي - يملك ذلك - وإلا فلا - كذا في
السراجية * وتفسير الاستدانة - أن لا يكون للوقف غلة - فيحتاج إلى
القرض والاستدانة أما إذا كان للوقف غلة - فانفق من مال نفسه لإصلاح
الوقف - كان له أن يرجع ذلك في غلة الوقف - كذا في فتاوى
قاضي خان *

When the *mutawalli* wishes to borrow on the security of the *waqf*, in order to pay off the mortgage money (literally price of mortgage), he is empowered to do so with the sanction of the Cadi ; otherwise not. Thus it is laid down in the *Sirajiyah*. The circumstances which justify borrowing arise when there is no income of the *waqf* and thereby necessitates borrowing and contracting loan. But if there be any income of the *waqf*, and the *mutawalli* applies his own money for the benefit of the *waqf*, he may recover the amount from the income of the *waqf*. Thus it is laid down in the *Fatawa Qadi Khan*. (*Fatawa 'Alamgiri*, Calcutta Edition, Volume II, page 519.)

TEXT VIII.

الدر المختار جلد ثالث

[صفحہ ۲۴۹]

لا تجوز الاستدانة على الوقف - الا اذا احتيج اليها لمصلحة الوقف
لتعمير و شراء بذر فيجوز بشرطين - الاول - اذن القاضي فلو يبعد منه
يستدين بنفسه الثاني أن لا تيسر اجارة العين ، الصوف من اجرتها *

It is not permitted to borrow on (the security of) *waqf* property, except when recourse to it becomes necessary for the benefit of the *waqf*, for example, for the purpose of repairs and purchase of seed grains. In such a case it is permitted, subject to the following two conditions :—(1) the permission of the Cadi ; but if the Cadi happens to be at a distance, he may borrow on his own authority ; (2) when it was not possible to lease the property (literally corpus) and to spend the rents, etc., arising therefrom. (Durr al-Mukhtar by al-Hiskafi, A.D. 1677, Constantinople Edition, Volume III, page 649.)

TEXT IX.

رد المختار جلد ثالث

[صفحہ ۹۶۹]

أذنه اذا لم يكن من الاستدانة بد تجوز بأمر القاضي - ان لم يكن
بعيدا عنه - لان ولايته أعم في مصالح المسلمين - و قيل تجوز مطلقا -
لعمارة - و المعتمد في المذهب الاول *

When it is indispensable to borrow, it is permitted with the sanction of the Cadi, if he does not happen to be at a distance from him (that is, the *mutawalli*), because the Cadi has general powers with respect to what is beneficial for the Muslims. And it is said it is permitted unrestrictedly (that is borrowing is permitted even without the sanction of the Cadi) for the purpose of repairs, but the first view is relied upon by the school. (Radd-al Muhtar by Ibn 'Abidin, A.D. 1836, Constantinople Edition, Volume III, page 649.)

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TEXT X.

فتاوى مهديه جلد ثاني

[صفحه ۴۹۹]

في شرح التذويرو - ما نصه - ليس للمتولي ان يستدين على الوقف للعمارة الا باذن القاضي - فاذا استدان الناظر المذكور باذنه لعمارة عقار الوقف لا يكون اِبْغايي مستحكي الوقف مطالبته بشئ من الغلة قبل استيفاء ما صرفه في العمارة *

It is laid down in the commentary of al-Fanwir : the *mutawalli* cannot borrow on (the security of) the *waqf* for the purpose of repairs, except with the permission of the Cadi. If the above-mentioned *mutawalli* (that is, the *mutawalli* mentioned in the question to which the *Fatawa* is the answer) borrows with his (Cadi's) permission for the purpose of repairing *waqf* property, the beneficiaries cannot demand their dues till the debt is satisfied. (*Fatawa Mahdiah* by Sheikh al-Islam Muhammad al-'Abbasi, Grand Mufti of Egypt, A.D. 1883, Volume II, page 469.)

TEXT XI.

[ايضاً صفحه ۵۱۲]

الاستدانة على الوقف لا تجوز - الا بشروط ثلاثة - الاول ان تكون لضرورة كتعمير - الثاني - اذن القاضي - الثالث ان لا تكتسر اجارة العين والصرف من اجرتها *

It is not permitted to borrow on (the security of) *waqf*, except subject to the following three conditions :—(1) for necessity, for example repairs ; (2) permission of Cadi ; (3) that it was not possible to lease the property and spend the income arising therefrom. (*Fatawa Mahdiah*, Volume II, page 512.)

These texts indicate that property which has been validly dedicated as *waqf* cannot, unless the *mutawalli* is expressly empowered by the deed of endowment to do so, be ordinarily sold or mortgaged. If, however, necessity is established and the

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permission of the Cadi is obtained, such alienation is valid. Some of the texts, however, indicate that the *mutawalli* may borrow on his own authority if the Cadi happens to be at a distance; but the condition is imposed that the *waqf* property should not be mortgaged if the same object can be attained by a lease. This would seem to show that the previous permission of the Cadi is not a condition precedent, and Sir Roland Wilson appears to favour this view when he suggests that the transaction may be retrospectively confirmed by the Court (Anglo-Mahomedan Law, 3rd Edition, Section 337). In cases in which the permission of the Cadi has to be obtained, the question may arise as to which officer under the British system of Administration of Justice is to be regarded as qualified to discharge his duties. The case of *Shama Churn Roy v. Abdul Kabeer* (1) adopts the view that the Civil Court of superior jurisdiction in the district is vested, generally speaking, with the powers exercised by the Cadi under the Mahomedan *régime*. Again, in the case of *In the matter of Woozattunnessa Bibee* (2), it was ruled that in Presidency Towns the High Court, in its original jurisdiction, can authorise under Mahomedan Law dealings with *waqf* property. It must be conceded, however, that the British system of Administration of Justice differs in so many essential respects from the Mahomedan system that any analogy between the position of a Cadi and that of a District Judge, or of a Judge of this Court exercising original jurisdiction, must be more or less farfetched; and we can see no reason why an approval by a Subordinate Judge of a transaction by which *waqf* property is mortgaged, provided he has jurisdiction over the *waqf* property, should not be quite as effectual as a sanction by a District Judge. The truth is that the analogy is more or less artificial, as the Cadi (who was ordinarily assisted by a Mufti) was entrusted with the exercise of discretion in this matter not merely because he was a judicial officer, but also because he was well qualified to form an opinion as to what would be beneficial to Muslims from an orthodox religious point of view. Apart from this aspect of

(1) (1898) 3 C. W. N. 158.

(2) (1908) I. L. R. 36 Calc. 21.

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matters, in the case before us there is no question as to the absolute necessity for the mortgage and of the undoubted benefit which has been conferred on the endowment by the transaction. There is no question also that within the meaning of the rule as laid down in Text VIII quoted from the Durr al-Mukhtar and Text IX from the Radd al-Muhtar, the Cadi was at a distance from the place where the properties were situated and the transaction took place. The Subordinate Judge has found that the mortgage was proper and may in substance be taken to have retrospectively approved by it. It is difficult to appreciate how, under these circumstances, the mortgage can be treated as void. The view that we take is substantially supported by modern text-writers : Thus, for instance, Baillie in his *Digest of Mahomedan Law* (Volume I, 1st Edition, 597 ; 2nd Edition, 608) describes the circumstances in which the Superintendent is allowed to borrow, and points out that for the payment of land tax or tribute, when there is no means to pay them out of the *wagf*, the *mutawalli* may borrow with the sanction of the Judge, the loan to be afterwards repaid out of the produce. Ameer Ali observes (Mahomedan Law, Volume I, page 374,) that this rule should not be too literally understood, and that the prohibition against the creation of debts by the *mutawalli* could not have been intended to refer to such debts as, owing to the exigencies of society, must necessarily be contracted from day to day for the due discharge of the works of the trust. M. Clavel in his treatise on *wagf* or Habous deals with this subject at length. In section 152 he observes as follows :—"From the fact that the immovable property cannot be alienated when the question is concerned with the *wagf* of the immovable property, it results that it is susceptible neither of hypothecation nor of attachment. This principle is beyond all discussion. It has been judged by the Courts of Alexandria that hypothecation agreed upon by the owner with respect to property which he has previously made *wagf* of is null ; and also that *wagf* lands cannot be the object of an attachment or sale, or of any alienation whatever, and therefore are not susceptible of hypothecation. The Court

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of Algeria has in the same way proclaimed that immovable property made a *Habous* ought to remain exempt from all charges in the hands of the beneficiary. The creditors of the beneficiary have no sort of privilege in the immovable property, whatever be the origin of their debts. In section 250 the learned author makes the following remarks: "The Nazir (the *mutawalli*) not having the power of mortgaging either the property or the income of the *waqf* cannot contract loans. This principle is invariable. It may, however, happen that a loan is absolutely necessary, for example, to provide for urgent repairs and avoid deterioration or even the demolition of the immovable property. In this case the Cadi may authorise the Nazir to borrow the sum indispensably necessary; but all obligations contracted by the Administrator without a formal authorisation is radically null with regard to the *waqf*. As said in the *El Bahr*, borrowing is absolutely prohibited of things which can be dispensed with; for indispensable things it cannot be validly contracted except by the authorisation of the Cadi." It is worthy of note that the modern text-writers—Baillie, Clavel and Ameer Ali—do not discuss the question when the matter is one of urgent necessity and the Cadi is at a distance, nor do they examine the effect of retrospective approval by the Cadi. The texts, however, to which we have referred, indicate plainly that the consent of the Cadi is essential whenever he is available, and if so, there is no reason why approval subsequent to the transaction should not be treated as effective in the same manner as approval prior to the transaction. It is but rational to hold that the approval of the Cadi was deemed requisite, primarily with a view to make sure that the loan was necessary, and in this view approval, antecedent or subsequent, ought to be equally effectual. Tested in the light of these principles, it is clear that in the case before us the mortgage ought to be treated as a valid charge upon the *waqf* properties.

The next question which requires consideration is, what direction should be given for the recovery of the debt. The texts quoted above indicate that, if practicable, the debt ought

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to be repaid out of the income of the *wagf* properties. The sixth text quoted from the Is'af of al-Tarabulusi shows that the *mutawalli* who raises a loan on mortgage of the *wagf* properties should pay off the debt out of the income of the *wagf*. The eighth text quoted from Durr al-Mukhtar and the eleventh text from the Fatawa Mahdiyah point in the same direction when they lay down that a recourse to mortgage is permissible only when it is not possible to lease the corpus and spend the income thereof. To the same effect is the tenth text, which shows that when a valid mortgage has been effected for necessity and approved by the Cadi, the beneficiaries cannot demand their dues till the debt is satisfied.

That a mortgage debt should be paid out of the income and even from rent paid by the *mutawalli* who may take a lease for the purpose is manifest from the following passage translated from an authoritative work on the law of *wagf* (Adda and Ghaloungui-Droit Musulman, Le Wakf, Alexandria 1893, page 275):—

“Section 561.—The lease agreed upon by the Nazir in order to pay off the debt owed by a *wagf* is valid (one after the other).

“Section 562.—Where the Nazir himself takes the lease, he can be exempted from the payment of the rents and can also set them off against the money owing to him.

“NOTE I.—*Wagf* as well as its administration are found at a given moment to devolve upon a beneficiary.”

“This sole beneficiary who, as we have said already, was at the same time the Nazir, has let the *wagf* lands for a certain period and for customary rents to his creditor in order to compensate his credit.

“Is the said compensation valid? Yes, by analogy with the principle admitted in El Bazzaziah in the Chapter of Will which is as follows:—“There is a compensation when the Wasi of the minor sells the goods of the latter to his creditor, the *wagf* and the will being of the same nature. There is all the more reason then for compensation in our case where the lessee is the sole beneficiary and consequently can compensate what he alone ought to draw” (also El Cazrouni).

“ El Khalashi in his Collection of Judgments says in answer to a question like the previous : “ If the Nazir is the beneficiary of all the rents, if the period should have expired and the debt be of the same nature as the rents, there is no doubt as to the validity of the compensation. But if the said beneficiary derives benefit only for one portion of the revenues, the compensation is as valid according to Abu Hanifa and Muhammad excepting with respect to the responsibility of the Nazir.

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“ Abu Yusuf, after having declared his opinion in favour of the inadmissibility of the compensation, says that the authors who admit it may cite it, and he goes on to mention the said authors adding the following note that “ it is therefore clear that one may validly exempt the tenanting Nazir from the rents, and the validity of the compensation depends on the admissibility of the exemption just as has been said by El Ala-i.”

It is not necessary for us in the present case to consider whether, when a valid mortgage has been created of *waqf* property for necessary purposes and approved by a judicial officer whose functions are assumed to correspond to those of a Cadi, it is competent to a Court to direct the sale of the mortgaged properties for the satisfaction of the debt. It is sufficient for us to observe that judicial pronouncements of the highest authority are to be found in the reports in support of the view that not the corpus, but the income alone can be pledged under such circumstances. Sir Michael Westropp C.J. stated in *Narayan v. Chintamon* (1) that religious endowments in this country, whether they be Hindoo or Mahomedan, are not alienable, though the annual revenues of such endowments, as distinguished from *corpus*, may, for purposes essential to the temple or other institution endowed, be occasionally pledged. The same view was affirmed in *The Collector of Thana v. Hari Sitaram* (2) and has been emphatically endorsed by Sir Subramaniam Ayyar C.J. in *Nallayappa Pillian v. Ambalavana Pandara Sannadhi* (3), where it was maintained that according to the Indian Common Law relating to Hindu religious

(1) (1881) I. L. R. 5 Bom. 393.

(2) (1882) I. L. R. 6 Bom. 546.

(3) (1903) I. L. R. 27 Mad. 465 (472).

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institutions the corpus was inalienable, and the revenues thereof might alone be pledged for the necessities of the institution. It is needless, however, for us in the present case to enter into an examination of this comprehensive proposition, as the mortgagees have declared that they will be quite satisfied if arrangement is made for payment of their dues from the income of that portion of the *waqf* properties which is covered by the mortgage. They have further agreed that this can be most satisfactorily arranged by the appointment of a Receiver. We need not consequently examine whether the decision of the Sudder Court in *Moulvee Abdoolah v. Rajesri Dosea* (1), which was accepted as good law in *Shama Churn Roy v. Abdul Kabeer* (2), may not require qualification. No doubt, as laid down by the Judicial Committee in *Jewun Doss Sahoo v. Shah Kubeerooddeen* (3), when property has been dedicated as *waqf*, sale or transfer of the thing appropriated is unlawful. But neither this case nor the other decision upon which reliance is usually placed in support of the inalienability of *waqf* property [*Shoojat Ali v. Zumzerooddeen* (4), *Doyal Chund Mullick v. Syul Keramut Ali* (5), and *Syul Asheerooddeen v. Sreemutty Drobomoyee* (6)] lays down that a mortgage can under no circumstances, and for no purpose, be effected of *waqf* properties, or that a mortgage for necessary purposes and not approved by the Cadi because he is not available or approved by him subsequently, cannot be repaid out of the income of the property. On the other hand, there is a passage in the judgment of the Judicial Committee in *Jewun Doss Sahoo v. Shah Kubeerooddeen* (3) which indicates plainly that although the alienation may be illegal, if the purchase-money has been applied to the use of the *waqf*, the party benefitted may perhaps be required to account for it.

The only question which remains for consideration is in respect of what sum the plaintiff can legitimately claim to be

(1) (1846) B. S. D. A 26 6;
 7 Mac. Select. Rep. 320.

(3) (1840) 2 Moo. I. A. 390, 423.

(4) (1866) 5 W. R. 158.

(2) (1898) 3 C. W. N. 158.

(5) (1871) 16 W. R. 116.

(6) (1876) 25 W. R. 557.

repaid out of the income of the *waqf* property comprised in the mortgage security.

As stated previously, the principal sum advanced under the mortgage was Rs. 1,120. The rate of interest was 12 per cent. per annum with quarterly rests. It is impossible to hold that a loan by a trustee of endowed property at such a high rate of interest is beneficial to the endowment, although the principal sum itself might have been urgently needed for the protection of the endowment. In a case like this, the Court is perfectly justified in allowing interest at a reduced rate, on the principle explained by their Lordships of the Judicial Committee in *Gunga Pershad Sahu v. Maharani Bibi* (1) and *Hurro Nath Rai Chowdhri v. Randhir Singh* (2) and applied by this Court in *Abhiram Pal v. Mukunda Lal Dutt* (3). In our opinion the mortgagee, in so far as he seeks any relief against the *waqf* property, ought not to be allowed to throw upon it a burden greater than that of the principal sum and simple interest at 9 per cent. per annum; the *mutawalli* was no doubt under a necessity to borrow the principal sum, but there is no necessity to borrow at a high rate of compound interest. On this calculation the amount due under the mortgage, allowing credit for a payment of Rs. 500 made on the 3rd December 1905, would amount to Rs. 1,790 up to the date of the decree of this Court.

The plaintiffs would be entitled to be paid this portion of the decretal money from the funds that may come into the hands of the Receiver; this is in addition to the mode of relief indicated in the decree of the lower Court.

The result, therefore, is that this appeal must be allowed and the decree of the Court below varied by the addition of the following clause :—“Out of the sum payable under the decree, the plaintiffs are declared entitled to recover Rs. 1,790 from the income of the *waqf* property mentioned in Schedule (7) item No. 2, which for this purpose will be placed by consent of

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(1) (1884) I. L. R. 11 Calc. 379;
L. R. 12 I. A. 47.

(2) (1890) I. L. R. 18 Calc. 311;
L. R. 18 I. A. 1.

(3) (1906) 5 C. L. J. 542.

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parties in the hands of a Receiver to be appointed by the Subordinate Judge. The Receiver will act under the directions of the Subordinate Judge, who will determine what portion of the income of the property placed in his charge should, with due regard to the legitimate needs of the *waqf*, be periodically applied towards the payment of the sum of Rs. 1,790."

The case will be remanded to the Subordinate Judge, to enable him to carry out the orders of this Court. We make no order as to the costs of this appeal.

Appeal allowed; case remanded.

S. C. G.

CRIMINAL REVISION.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
 Mr. Justice Chatterjee.*

1909
 Nov 4.

RAM LAL SINGH

v.

HARI CHARAN AHIR.*

Judgment of Appellate Court, contents of—Charges of unlawful assembly and theft—Statement of points for determination and findings thereon in such cases—Criminal Procedure Code (Act V of 1898), ss. 367, 424.

Under section 424, read with section 367, of the Criminal Procedure Code, the judgment of a lower Appellate Court must, among other matters, contain the point or points for decision, the decision thereon, and the reasons for the decision.

On a charge under section 143 of the Penal Code, the judgment of such Court should contain, as one of the points for determination, a statement as to the existence of the elements constituting the unlawful assembly in the particular case and the decision thereon, bearing in mind the provisions of section 141 of the Penal Code.

The judgment on a charge under section 379 of the Penal Code should contain, as one of the points, the question as to the dishonest intention and a finding on it, especially when the taking of property is admitted, but a *bond fide* claim of right thereto is set up by the accused.

ON the complaint of one Hari Charan Ahir, the petitioners were tried before Chowdhry Nazir Alum, Deputy Magistrate

* Criminal Revision No. 1112 of 1909, against the order of J. Johnston, Officiating District Magistrate of Arrah, dated Aug. 3, 1909.

of Arrah, under sections 143 and 379 of the Penal Code, for unlawful assembly and theft by cutting and taking away the crops of certain land belonging to the complainant's master, Bishun Dutt Patak, who claimed it as his *zerait*. The petitioners admitted the removal of the crops, but claimed to act as of right on the ground that the land was their *guzasta* holding under Bishun Dutt. In support of their case they adduced oral and documentary evidence to prove the nature of their tenancy. They were convicted under both the sections charged against them, and sentenced to three weeks' rigorous imprisonment on 8th July 1909. On appeal, the District Magistrate of Arrah affirmed the conviction and sentences by his judgment dated the 23rd August 1909. The petitioners, thereupon, moved the High Court and obtained the present Rule.

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Babu Dasharathi Sanyal and *Babu Sarat Chunder Lahiri*,
for the petitioners.

Babu Manmatha Nath Mukerji, for the opposite party.

JENKINS C.J. AND CHATTERJEE J. The Rule in this case calls upon the District Magistrate to show cause why the conviction and sentence of the petitioners should not be set aside on the ground that the findings arrived at are not sufficient for making out the offence under the sections under which the petitioners have been punished, or why there should not be a re-trial of the appeal or such other order made as to this Court may seem fit and proper under the circumstances of the case.

It is continually overlooked by Courts of Appeal that section 424 of the Criminal Procedure Code prescribes that the rules contained in Chapter XXVI as to the judgment of a Criminal Court of Original Jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court; and one of the sections in Chapter XXVI is section 367, which prescribes that a judgment shall, among other things, contain the point or points for determination, the decision thereon, and the reasons for the decision. Now, the conviction in this case by the Court of first instance was both under section 379 and section 143. For the purpose of an

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offence under section 379, it is necessary that it should be proved that there was an intention to take dishonestly any moveable property out of the possession of the person aggrieved without that person's consent ; and one of the points for determination, therefore, is whether there was that intention. Admittedly, there is no finding on that point in the judgment of the lower Appellate Court. This is not a mere technical objection, because one of the points urged on the part of the defence is that, though there may have been the moving of property, there was not the intention to take that property dishonestly out of the possession of any other person, inasmuch as, it is contended, there was a *bonâ fide* claim of right ; so that it is apparent that it was absolutely essential that that point should be contained in the judgment, and that it should be decided. Then, again, in the treatment of the offence under section 143, there is a similar defect. Section 143 prescribes the punishment for any one who is a member of an unlawful assembly. But before any one can be convicted of that, it must be determined that there was an unlawful assembly : in other words, the judgment should contain, as one of the points for determination, a statement as to the presence of the conditions which constitute the unlawful assembly in the particular case, and the decision thereon, bearing in mind the provisions of section 141 of the Indian Penal Code. Admittedly, I say admittedly because on this point we allowed the complainant to make a statement before us, there is no such point contained in the judgment, nor is there any decision as to the essential elements of the unlawful assembly. In ordinary circumstances we should have sent the case back for re-hearing in the lower Appellate Court and for a fresh decision according to law ; but as the sentences must have been served with the exception of two days, according to the statement made to us by the learned pleader on behalf of the applicants, we think that that will be unnecessary. We accordingly make the Rule absolute in the sense that we set aside the conviction and sentence.

Rule absolute.

APPELLATE CIVIL.

Before Mr. Justice Holmwood and Mr. Justice Chatterjee.

NARSINGH DAS

v.

RAFIKAN.*

1909

Nov. 25.

Right of Suit—Non-service of Summons—Fraud—Civil Procedure Code (Act XIV of 1882), s. 108—Ex-parte decree.

A fresh suit would not lie to set aside a decree on the mere ground of non-service of summons, though it would be maintainable on the ground of fraud.

Radha Raman Shaha v. Pran Nath Roy (1) and *Khagendra Nath Mahata v. Pran Nath Roy* (2) referred to.

Puran Chand v. Sheodat Rai (3) followed.

SECOND APPEAL by Narsingh Das and another, the defendants second party.

The plaintiff, Musammat Rafikan, being the owner of the properties in dispute by virtue of a deed of gift, dated 13th December 1859, from her father, Waizuddin Hossain, executed a lease of the properties on the 14th December 1859 in favour of her father and her mother, Ulfat, for a term of 30 years, expiring on the 7th December 1889. The plaintiff's father died in 1892, and her mother and brother Najimuddin continued in possession as *ticcadars* even after the termination of the lease, paying the rent reserved by the lease to the plaintiff, until the death of her brother in 1898.

The plaintiff's brother, Najimuddin, alleging himself to be the owner of the properties by a verbal deed of gift from Rafikan, had his name registered as proprietor in 1879, and mortgaged the properties in 1886 to Narsingh Das and Ram Pertab

* Appeal from Appellate Decree, No. 1091 of 1907, against the decree of H. E. Ransom, District Judge of Darbhanga, dated Feb. 25, 1907, confirming the decree of Kali Krishna Chowdhury, Subordinate Judge of Mozufferpore, dated Jan. 13, 1904.

(1) (1901) I. L. R. 28 Calc. 475.

(2) (1902) I. L. R. 29 Calc. 395.

(3) (1906) I. L. R. 29 All. 212.

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Das, defendants Nos. 3 and 4, and subsequently sold the same to Ajodhya Pershad Singh Thakur and Ambika Pershad Singh, the defendants Nos. 1 and 2.

In 1895, the mortgagees, i.e., the defendants Nos. 3 and 4, brought a suit on their mortgage and made Rafikan, the plaintiff No. 1, and defendants Nos. 1 and 2 as parties defendants, and obtained a decree, and in the execution-sale the properties were purchased by defendants Nos. 3 and 4 for Rs. 6,500. The plaintiff brought this suit for the recovery of khas possession of the properties, but was resisted by the defendants, who claimed under alienation from her brother, and also pleaded that by law of estoppel the plaintiff having allowed Najimuddin, her brother, to hold the properties in dispute as owner, and by the fact of the plaintiff's raising no objection to the title of Najimuddin in the mortgage suit brought against him to which the plaintiff was a party defendant, she was estopped from challenging the decree. The Subordinate Judge held that as the service of summons on Rafikan in the mortgage suit was not proved, and as she denied all knowledge of the suit, she was not bound by it, and decreed the suit for khas possession.

The District Judge, on appeal, reversed the decree and dismissed the suit. On appeal, the High Court remanded the case for a finding on the question of the character in which Najimuddin held possession of the property, and whether such possession was that of a manager or adverse to the interest of the plaintiff, and also whether the question of estoppel was made out. The District Judge, having heard the case on remand, came to the conclusion that possession by Najimuddin was not adverse, that estoppel was not made out, and that the defendant's purchase was not shown to be *bonâ fide*; and he accordingly dismissed the appeal.

The defendants second party now appealed to the High Court.

Babu Umakali Mookerjee (with him *Babu Lachmi Narayan Singh*), for the appellants, contended that the plaintiff, Bibi

Rafikan, being made a party defendant in the mortgage suit, and an *ex-parte* decree having been passed in the said suit, unless the said decree be set aside, the plaintiff is bound by the decree. Moreover, Rafikan having allowed the property to stand in the name of Najimuddin, she was estopped by her conduct from impeaching the sale. That the defendants appellants being *bonâ fide* purchasers for value, the suit of the plaintiff ought to be dismissed.

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Dr. Rashbehary Ghose (with him *Babu Buldeo Narain Singh* and *Babu Chandra Sekhar Banerjee*), for the respondents. The plaintiff, Musammat Rafikan, being unaware of the suit instituted by the defendants, Narsingh Das and others, and the sale proceedings having taken place without the plaintiff's knowledge and not being served on her, she was entitled to have the decree set aside on the ground of fraud. Moreover, the service of summons on her in the mortgage suit by the defendant, Narsingh Das, was not proved, and she was not bound by the decree made therein.

Our. adv. vult.

HOLMWOOD AND CHATTERJEE JJ. The plaintiff brought the suit giving rise to the present appeal on the allegation that her father had made a gift of the disputed property to her in 1859: that she gave a lease of the property to her father and mother, that on her father's death her brother and mother held possession under the lease until the death of her brother in 1898, when, on going to assume khas possession, she found herself obstructed by the defendants who claimed under alienations from her brother.

It appears that in 1879 her brother, Najimuddin, got his own name registered as proprietor under an alleged verbal gift from her, and thenceforward continued dealing with the property as his own. In 1886 he mortgaged the disputed property to defendants Nos. 3 and 4. In 1888 he sold the same to defendants Nos. 1 and 2. In 1895 defendants Nos. 3 and 4 brought a suit on the mortgage and therein impleaded the plaintiff No. 1 as well as defendants Nos. 1 and 2 and Najimuddin as

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parties defendants. The suit was decreed, and at a sale held in execution thereof, the disputed property was purchased by defendants Nos. 3 and 4 for Rs. 6,500.

Amongst other things the defendants Nos. 3 and 4 pleaded in this suit that by reason of allowing Najimuddin to act as the owner of the property, and also by reason of her having taken no objection as to the title of Najimuddin in the mortgage suit, the plaintiff was barred by the plea of estoppel. The Court of first instance decreed the suit. On appeal, the District Judge dismissed the suit; but on second appeal this Court remanded the case for a clear finding on the question as to the character in which Najimuddin held possession of the property, *i.e.*, whether he had been in possession as manager or adversely, and also on the question of estoppel. The District Judge, on remand, has held that the possession was not adverse and that estoppel is not made out.

It is contended in second appeal before us that at least the question of estoppel has not been properly tried, and on the facts appearing on the face of the record, the suit should have been dismissed.

The Subordinate Judge held that, in regard to the mortgage suit, the plaintiff denied all knowledge of this suit and the defendants could not prove that the summonses were duly served upon her. He goes on to say—"paragraph 6 of the plaint of the mortgage suit would show that Bibi Rafikan (the plaintiff) was made a party, simply because she got her name registered in respect of Chak Garia, one of the mortgaged properties. Whatever that might be when the service of summons on her is not proved, and when Rafikan denied all knowledge of the suit, she was not bound by it." The District Judge, who first heard the appeal, held that the properties had been continuously in the hands of other persons to her knowledge, and the suit was barred by limitation. After remand by this Court the present District Judge has gone into the question of estoppel in a rather careless manner. He says:—"the evidence as to Rafikan having been made a party to the mortgage suit is meagre and unsatisfactory," and therefore estoppel is not made

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out. If we read the language of the learned District Judge according to the ordinary sense of the words used, he is evidently wrong, for the plaintiff No. 1 was, on the face of the mortgage decree, a party defendant in the suit. It may, therefore, be that he meant to say, like the Subordinate Judge, that the service of summons upon her had not been proved, as otherwise there would be no meaning of the words "meagre and unsatisfactory." But even reading this meaning into the words used by the learned Judge, and taking it for granted that the onus of proving non-service was not misplaced, a further question remains to be decided, whether the plaintiff can get rid of the effect of the decree in the mortgage suit by simply proving that she was not served with the summons. The mortgage decree, which is *inter partes*, is *prima facie* binding on the plaintiff until it is legally set aside, and although she says she came to know of the defendant's possession in 1898, and evidently the title which they asserted, she has not taken any steps for that purpose. The principle of *res judicata* is a principle of rest and convenience, and not of absolute justice. It may be that the plaintiff was really unaware of the suit, and the decree and the sale proceedings were all behind her back; but she was bound, as soon as she came to know the facts, to come to Court in the only manner in which the sanctity of a solemn act of Court can be impeached. She ought to have applied, if possible, to have the decree set aside under section 108, Civil Procedure Code, if she complained only of non-service of summons, or to have applied for a review on the ground of fraud, or brought a regular suit on the ground of fraud if she alleged any. She has done nothing of the kind, and pleads ignorance of the suit when challenged by a title sanctified by a Court sale in execution of a solemn decree of the Court. There is no doubt that fraud will re-open and nullify the most solemn acts of Courts of Justice, and it has been held in a series of cases that a suit will lie for setting aside a decree on the ground of fraud: see *Abdool Mazumdar v. Mahomed Gazi* (1), *Mahomed Golab v. Mahomed*

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Sulliman (1), *Pran Nath Roy v. Mohesh Chandra Moitra* (2), *Nistarini Dassi v. Nundo Lall Bose* (3), *Radha Raman Shaha v. Pran Nath Roy* (4), *Khagendra Nath Mahata v. Pran Nath Roy* (5). But fraud is neither pleaded nor proved in this case, and the only finding that assails the title of the defendants is non-service of summons. There is no direct authority in this Court that a decree can be impeached on this ground except under section 108 of the Civil Procedure Code. The question, however, was raised in several cases, and the decisions seem to show more than indirectly that non-service of summons alone is not a ground for setting aside a decree by suit. In the case of *Abdul Mazumdar v. Mahomed Gazi* (6), the learned Judges are reported to have said "it was argued that as the non-service of summons was the only indication of fraud alleged in the plaint, the proper course for the plaintiff was to proceed under section 108 of the Code of Civil Procedure for setting aside the *ex-parte* decree. But what is alleged in the plaint is not mere non-service, but fraudulent suppression of the summons, which must be the result of deliberate design:" the suit was held to be maintainable only if fraud was proved. There is an elaborate discussion of the principles upon which decrees are set aside for fraud in the cases of *Mahomed Golab v. Mahomed Sulliman* (1) and *Nistarini Dassi v. Nundo Lall Bose* (3), but no reference to the relevancy of section 108 of the Civil Procedure Code in that connection. In the case of *Pran Nath Roy v. Mohesh Chandra Moitra* (2), the learned Judges say—"it may be conceded that the plaintiff could not bring a suit to set aside the decree on the bare ground that the summons was not served, or that he was prevented for some good reason from defending the suit, and that would be so whether he had or had not availed himself of the remedy provided by section 108." This was, however, a mere opinion, as the case was really based on fraud. This case went on appeal to the Privy Council, and Lord Hobhouse, in delivering the judgment of the Judicial

(1) (1894) I. L. R. 21 Calc. 612.

(2) (1897) I. L. R. 24 Calc. 546.

(3) (1899) I. L. R. 26 Calc. 891.

(4) (1901) I. L. R. 28 Calc. 475.

(5) (1902) I. L. R. 29 Calc. 395.

(6) (1894) I. L. R. 21 Calc. 605.

Committee, said—"it is impossible to say that the matter now alleged as fraudulent matter came in any way before the Court under the application which was made by virtue of section 108": *Radha Raman Shaha v. Pran Nath Roy* (1).

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In a similar case, *Khagendra Nath Mahata v. Pran Nath Roy* (2), before the Privy Council, it was argued that the applications of the plaintiff under sections 108 and 311 of the Civil Procedure Code having failed, he was not entitled to bring a suit for setting aside the decree and consequent sale on the ground of fraud. Lord Robertson, in delivering the judgment of the Judicial Committee, said—"those sections limit the attention of the tribunal to specific matters, and instead of subjecting to enquiry the radical question now involved, they assume the existence of a real suit. But here the suit itself is attached as a fraud." These cases indirectly support the view that if non-service of summons were the only ground on which a decree is impeached no fresh suit would lie. There is direct authority, however, in the Allahabad High Court, in the case of *Puran Chandel v. Sheodat Rai* (3). In this case an application under section 108, Civil Procedure Code, having been rejected, it was held that the plaintiff could not maintain a fresh suit on the ground of non-service of summons.

If the question of non-service of summons cannot be raised by suit, it cannot be raised as a defence to a suit, and the only remedy would appear to be an application under section 108. The plaintiff is, therefore, not entitled to impeach the decree obtained against her on the mere ground of non-service of summons, and so far as this case is concerned must be held to be bound by the mortgage decree and sale in execution thereof. In this view of the case the appeal must be allowed and the suit of the plaintiff dismissed, but under the circumstances of the case we do not allow costs in this Court: the appellants will have their costs in the Courts below.

Appeal allowed.

S. A. A. A.

(1) (1901) I. L. R. 28 Calc. 475.

(2) (1902) I. L. R. 29 Calc. 395.

(3) (1906) I. L. R. 29 All. 212.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Woodroffe.*

1909
Dec. 14.

JAWALA PRASAD

v.

MUNNA LAL SEROWJEE.*

Trade-mark—Registration, effect of—Vendor's mark—Infringement of trade-mark—Passing-off action—Injunction, variation of.

An action for the infringement of a trade-mark is maintainable, even though the plaintiff be not the manufacturer or selector of the goods, but merely a vendor of them.

There is no system of registration of trade-marks in India which gives a statutory title.

In a suit for the infringement of a trade-mark, the plaintiff claimed the right to the exclusive user of a flower of a particular design, but his evidence was directed to establish that his goods were recognised by the general design of a flower (*phul marka*) :—

Held, that in the circumstances of the case, an association had been established between the plaintiff's particular design and the goods sold thereunder, and inasmuch as the defendants had adopted the plaintiff's trade-mark for his own purposes, the plaintiff was entitled to an injunction.

Although no specific objection was taken on appeal to the form of the injunction ordered in the Court of first instance, which proceeded on the erroneous assumption that the goods sold by the plaintiff were prepared by him, a variation should be introduced into the terms of the injunction, so as to fit it with the facts as actually established.

APPEAL by the defendants, Jawala Prasad and others, from the judgment of Fletcher J. (1).

This appeal arose out of a suit brought by the plaintiff, Munna Lal Serowjee, for an injunction to restrain the defendants from infringing his trade-mark and for damages.

The plaintiff carried on business in Calcutta as a *ghee* merchant under the name and style and firm of Munna Lal Dwarkadas, and for a period of over twelve years he had sold

his *ghee* in Calcutta and foreign markets, tinned in canisters bearing his embossed mark, which consisted of a conventional flower on a stem with leaves, the flower being of the shape of an ellipse with an indented circumference, having within its circumference the initials of the plaintiff's firm M. D. S., and having under the design of the flower the name of the plaintiff's firm in the Devnagri character. This trade-mark was registered by the plaintiff in the year 1894.

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The defendants were also dealers in *ghee*, and from October 1902 to February 1903 the plaintiff acted as commission agent in Calcutta for the sale of the defendant's *ghee*. The infringement complained of consisted in the fact that the defendants used on their canisters of *ghee*, intended for sale and export in the same markets, a colourable imitation of the plaintiff's mark. It was alleged that the defendants' trade-mark was calculated to deceive, and that it had in fact deceived, purchasers by inducing them to purchase the defendants' goods in the belief that they were buying those of the plaintiff.

The actual design of the defendants' flower was almost exactly the same as the plaintiff's mark : the initials, however, within the circumference were J. P. M., the initials of the defendants' firm, and the name of the defendants' firm was inscribed beneath the flower also in the Devnagri character. Unless the names and initials were read, the marks were not distinguishable.

It was contended by the defendants that the flower-mark or "*phul*" mark was one which was common to a large number of traders in *ghee*, and that each trader inscribed his name and initials as a distinguishing mark, and that purchasers of *ghee* invariably asked for the "*phul*" mark of the particular trader whose goods they desired to purchase.

At the hearing of the suit, the evidence adduced by the plaintiff on the question of repute was not directed to the real point at issue, *viz.*, that the plaintiff's goods were associated with his particular mark, but rather sought to establish that his goods were recognised by the general design of a flower (*phul-marka*).

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Fletcher J. came to the conclusion on the evidence "that canisters containing *ghee*, marked with the plaintiff's trade-mark, had come to be recognised in the market as *ghee* prepared by the plaintiff," and that the defendants had deliberately adopted plaintiff's trade-mark. His Lordship granted an injunction "restraining the defendants from selling or offering for sale *ghee* not prepared or manufactured by the plaintiff in canisters having embossed thereon a flower on a stem with leaves (the flower being in the shape of an ellipse with an indented circumference) without clearly distinguishing such *ghee* from the plaintiff's *ghee*," and directed an enquiry as to damages (1).

From this judgment the defendants appealed. It was admitted on appeal that the plaintiff was not the manufacturer of his *ghee*, but merely the selector and vendor.

Mr. B. C. Mitter (*Mr. S. K. Mullick* with him), for the appellants. Registration of a trade-mark in India does not give any statutory title. To succeed in a "passing-off" action local repute must be established: *Goodfellow v. Prince* (2). The decree is in variance with the evidence adduced by the plaintiff, who claimed the exclusive user of all "*phul*" or flower marks. The "*phul*" mark is a common incident of the trade and is extensively used: *Emperor v. Bakaullah Mallik* (3). Purchasers distinguish the goods of the various dealers by the initials and names. Where the mark is a common incident of the trade, closeness of resemblance is immaterial: see Kerly on Trade-marks, 3rd edition, pages 215 to 217, on the "three marks" rule. A trade-mark may be lost by extensive piracy: *National Starch Manufacturing Company v. Munn's Patent Maizina and Starch Company* (4). The defendants knew what the plaintiff's mark was all along, as they had acted as agents. Although delay does not bar the right of action [*Fullwood v. Fullwood* (5)], it may modify the relief granted and it has a

(1) (1908) I. L. R. 35 Calc. 311.

(3) (1904) I. L. R. 31 Calc. 411.

(2) (1887) L. R. 35 Ch. D. 9.

(4) [1894] A. C. 275.

(5) (1878) L. R. 9 Ch. D. 176.

bearing on the weight of evidence ; clearer proof of fraudulent intent and of actual injury will be required : *Rodgers v. Rodgers* (1), Seton's Judgments and Orders, 6th edition, Volume I, page 633. Promptitude is the life of a trade-mark : see Kerly on Trade-Marks, 3rd edition, page 425. To obtain an injunction, the plaintiff must show that at the date of the hearing of the suit in January 1908, repute still existed : *Ford v. Foster* (2). An injunction is in the nature of preventive relief. [WOODROFFE J. Ordinarily relief would be granted on the basis of the circumstances existing at the date of suit.] In a "passing-off" action, relief by injunction must go on the basis of the circumstances existing at the hearing of the suit, the object of an injunction being to prevent repetition. It would be otherwise in the case of relief by way of damages. The antiquity of a trade-mark has no importance : the important feature is repute. The enquiry as to damages is not justified.

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Mr. A. Chaudhuri (with him *Mr. Sircar*), for the respondents. I concede that if infringements had taken place since the date of suit in 1903, to the plaintiff's knowledge and without opposition, it would affect plaintiff's remedy. But there is no evidence of this. [WOODROFFE J. It is not your knowledge that is material : it is the loss of your repute in the mind of the public.] [JENKINS C.J. The mark would lose its denotation : where then would there be any "passing-off" ?] Fletcher J. was correct in coming to the conclusion that the defendants had deliberately adopted the plaintiff's mark. The addition of the defendants' initials and name did not avoid the infringement. The authorities are collected in Kerly on Trade-marks, 3rd edition, page 407. The infringement complained of is not with reference to the term "*phul-marka*" as a generic term, but to the closeness of the resemblance of the defendants' mark to the plaintiff's. It is not necessary for the plaintiff to establish that he was the manufacturer or even selector : it would be enough if the mark is identified with the plaintiff's dealing with the goods : *Major Brothers v. Franklin & Son* (3),

(1) (1874) 31 L. T. 285.

(2) (1872) L. R. 7 Ch. App. 611, 628.

(3) [1908] I. K. B. 712.

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Knott v. Marshall (1); Kerly on Trade-Marks, 3rd edition, page 54. [JENKINS C.J. What do you say to the terms of the injunction?] The injunction is unhappily worded: but the intention was to protect the plaintiff and the terms may be varied. On the question of damages, allegation of special damage is no part of the cause of action: there is, however, evidence of damage.

Mr. Mitter, in reply. Before the principle—that where the defendant has effected an imitation, the Court will not be astute to balance the evidence as to the closeness of the imitation—is applied, the plaintiff must establish the preliminary point of repute: see Kerly on Trade-Marks, 3rd edition, page 507, citing *Herschell L. C.* Now, what is the plaintiff's trade-mark? The plaintiff's evidence went to establish that he had a trade-name (*phul-marka*). There is no evidence that his trade-mark was the particular design of a flower, as distinguished from a flower itself. [JENKINS C.J. That is, he makes too big a claim. Can we not deal with the fact that this particular form of flower has been used by the plaintiff since 1894?] By placing his claim too high, the plaintiff may prevent the Court from defining the limits of his trade-mark. The foundation of a plaintiff's right is the distinctive feature of his trade-mark.

Cur. adv. vult.

JENKINS C.J. This appeal arises out of a suit brought by the plaintiff to establish his exclusive right to a mark, with consequential relief. The plaintiff is one Munna Lal Serowjee, who carries on business in Calcutta as a *ghee* merchant in the name, style and firm of Munna Lal Dwarkadas. The defendants are Jawala Prasad, Mawaram and Gopal Das, who carry on business as dealers in *ghee* under the name and style of Jawala Prasad Mawaram and Buktcar Mal Mody, who carries on business in Calcutta as a dealer and commission agent in *ghee*. Since the institution of this appeal one of the defendants

has died, and Mr. Mitter, who appeared on his behalf, has dropped the appeal so far as he is concerned.

It is alleged in the plaint, and established by the evidence, that for a considerable time, that is to say for twelve years, the plaintiff's *ghee* has been sold in Calcutta and foreign markets, tinned in canisters bearing his embossed mark, which consists of a flower on a stem with leaves, the flower being of the shape of an ellipse with an indented circumference, having within its circumference the initials of the plaintiff's firm M. D. S. The infringement is said to consist in the fact that the defendants used on their canisters of *ghee*, intended for sale and export in the same markets, a colourable imitation of the plaintiff's mark : and it is alleged that the use by the defendants of this mark is calculated to deceive, as it has deceived, by inducing purchasers to buy the defendants' goods in the belief that they are buying those of the plaintiff. Though the plaintiff's mark has been described as a registered trade-mark, there is no system of registration here which gives a plaintiff a statutory title, and therefore it is necessary for the plaintiff to establish that the mark, in respect of which he makes this claim, has acquired a reputation in connection with the goods that he sells. A trade-mark means a mark used to denote that goods are of the manufacture or merchandise of a particular individual. That is the office of a trade-mark, and much of the difficulty in this case has arisen from the fact that evidence has not been directed to establishing that particular point. However, Mr. Justice Fletcher has come to a clear and distinct finding on the evidence before him in these terms : "I have come," he says, "to the conclusion on the evidence that canisters containing *ghee* marked with the plaintiff's trade-mark have come to be recognised in the market as *ghee* prepared by the plaintiff," and so an injunction was granted by him "restraining the defendant from selling, or offering for sale, *ghee* not prepared or manufactured by the plaintiff in canisters having embossed thereon a flower on a stem with leaves, the flower being in the shape of an ellipse with an indented circumference, without clearly distinguishing such *ghee*

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from the plaintiff's *ghee*." In this finding, and in the consequent injunction, there is this error, that it assumed that the *ghee* was prepared by the plaintiff. This, admittedly, is not so. But it is contended on behalf of the plaintiff that though not prepared or manufactured by him, it is in fact selected and sold by him, and that contention is, I think, made good. The first question then that we have to determine is whether there is anything which supports the view that this particular mark used by the plaintiff on the canisters in which his *ghee* is tinned has come to denote in the market his *ghee*. We have the significant fact that from 1894 this mark has been claimed by the plaintiff as his own, and he has used that mark for the purposes of his trade in *ghee*. During the greater part of that time there has been no other mark of that character, and that naturally leads to the conclusion that the plaintiff's *ghee* did become associated with the mark which he throughout used; and though the evidence is, as I have said, not carefully directed to the real point in issue, I think there is sufficient in the evidence to justify the distinct finding of the learned Judge that the trade-mark has come to be recognized in the market as indicating the *ghee* of the plaintiff. In this connection, too, one cannot but be impressed by the fact that the plaintiff's mark was known to the defendants, and also by the very significant circumstance that with the whole world of flowers to choose from, for some reason or other, the defendants have selected this particular form of conventional flower, and they have not come forward to explain how it was that this came about. In the circumstances, I hold with the learned Judge that not only did this mark denote in the market the *ghee* of the plaintiff, but that the defendants did deliberately adopt the plaintiff's trade-mark for their own purposes. Having come to that conclusion, it necessarily follows that the plaintiff is entitled to succeed in this suit. The remedy that has been awarded to him by the Court of first instance has been first of all an injunction; and, secondly, an enquiry as to damages. No special ground of appeal has been directed against this enquiry as to damages, and it was not suggested to us, in the opening of the

appellants' case before us, that this enquiry was erroneous, except so far as the whole of the plaintiff's claim was misconceived. Mr. Mitter, however, proposed, in reply, to raise then, for the first time, a question as to the propriety of this enquiry as to damages. But we could not allow that question to be raised at that stage of this appeal, bearing in mind the grounds of appeal formulated for the consideration of the Court.

Though no specific objection was taken to the form of the injunction, I think it requires modification, because, as I have pointed out, it proceeds upon an assumption which cannot be sustained, that is, upon the assumption that the *ghee* sold by the plaintiff was prepared or manufactured by him. That is not so; and accordingly there must be a variation introduced into the terms of the injunction so as to fit in with the facts as they actually are established, by substituting the words "being *ghee* of" for the words "prepared or manufactured by." Then, again, the words "*ghee* from the plaintiff's *ghee*" (after the words "without clearly distinguishing such") are not correct, and the words "canisters from those in which the plaintiff's *ghee* is contained" should be substituted for them.

The result then is that, with this variation, the decree must be confirmed with costs, the costs of the two abandoned applications will be costs in the appeal.

WOODROFFE J. I agree that the appeal should be dismissed with costs. I think the action is maintainable, even though the plaintiff be not the manufacturer or selector of the goods, but is merely a vendor of them. The main point, however, which has been urged before us is this, that the claim is at variance with the evidence: what, it is said, the plaintiff claims is not the right to exclusive user of a flower, but to the exclusive user of the flower of a particular design which he registered in 1894. This, however, I may observe, was the claim that was made in the plaint, and it is in fact the right which has been protected by the decree.

It is further urged that the evidence, if believed, shows that the plaintiff's goods were recognised by the design of a flower

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alone (which was called *phul-marka*), and not by the particular design of a flower which the goods bear embossed on them, indicating the plaintiff's trade-mark, exhibit A. I agree with the learned Chief Justice in thinking that the evidence has not been on this point very happily directed. But this particular design has been used since the year 1894, and I am satisfied that for the greater part of this period no other design of flower has been used by any one selling *ghee*. Therefore, if the plaintiff's goods were associated with the mark of a flower, as there was only one flower, the association must have been with the flower of the particular design which the plaintiff has adopted. I think it is sufficient to show, in the circumstances of this case, that an association has been established between the plaintiff's particular design of a flower and the goods sold thereunder.

There is further evidence, it has been noted, that the plaintiff's goods are known by this mark—evidence which, in my opinion, is none the less acceptable because reference is made merely to the design of a flower, and not to the particular distinctive marks of the plaintiff's design. It must be remembered in this connection that, when that evidence was given, the witnesses had before them the particular exhibit, and I think it is reasonable to suppose that that evidence was given with reference to, and must be read in connection with, that exhibit. As to the similarity of the marks, this is transparent to the eye, and the doctrine of chances is all against coincidence and in favour of the conclusion that there has been, as the learned Judge has found, deliberate imitation. I do not consider, in the circumstances, that any direct evidence was necessary to establish that fact. It appears to me to be a legitimate conclusion from the evidence that is before us. Moreover, there is evidence that unless the names are read, the marks are not distinguishable. It may be, as the learned counsel for the appellants has pointed out, that some persons can read the Devnagri characters under the mark, which, he claims, distinguish his mark from that of the plaintiff. But it must be remembered that others cannot do so. The case

cited, *Blackwell v. Crabb* (1), must be taken in relation to the circumstances of that case and the country in which that judgment was pronounced. There it was an English name; and the mark was current in England, and naturally the name could be read and understood by everybody. But here the name is in Devnagri character, which is not readable by the greater portion of the public.

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Apart from this, we have this outstanding fact that the actual design of the defendants' flower is almost exactly the same as the plaintiff's mark. Why is this similarity if it serves no purpose? The adoption of an almost exactly similar mark indicates cogently, in my opinion, that the defendants believed that it was the design which sold the goods: if they did not, they would not have adopted it.

The only other point which I wish to add to what the learned Chief Justice has said is this: I am not satisfied, as regards the evidence of the plaintiff's witness, Nanda Lal, that he did not make any mistake as to the mark which he says he saw in the plaintiff's firm. I think it is very important in this connection to remember that the reply which he gave was in answer to a question put by one of the plaintiff's counsel in examination-in-chief.

Appeal dismissed.

Attorney for the appellants: *N. C. Bose.*

Attorney for the respondents: *Manuel and Agarwalla.*

J. C.

APPELLATE CIVIL.

*Before Mr. Justice Brett and Mr. Justice Sharfuddin.*1909
Dec. 22.

TAHALDAI KUMRI

v.

GAYA PERSHAD SAHU.*

Hindu Law—Succession—Mitakshara—Step-mother—Father's sister's son—Gotraja-sapinda—Letters of Administration.

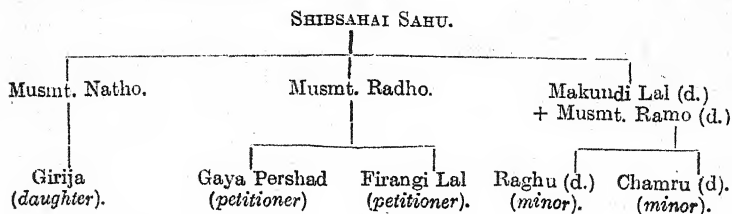
In the Bengal Presidency, under the interpretation of the Mitakshara law as accepted in the districts governed by that law, a step-mother is not entitled to succeed to the estate of her step-son either as a *gotraja-sapinda* or in preference to the father's sister's sons.

Lala Joti Lal v. Durani Kower (1), *Kumaravelu v. Viruna Goundan* (2), *Muttammal v. Vengalakshmi Ammal* (3) and *Rama Nand v. Surgiani* (4), referred to.

Kesserbai v. Valab Raoji (5), *Lallubhai Bapubhai v. Cassibai* (6) and *Russoobai v. Zoolekhabai* (7) not followed, having regard to the principle laid down in *Collector of Madura v. Mootoo Ramalinga Sathupathy* (8).

APPEAL by Musammat Tahaldai Kumri, one of the applicants for letters of administration.

The facts are briefly these: On the death of one Makundi Lal Sahu of Monghyr, his property passed to his two minor sons, Raghu Sahu and Chamru Sahu. The minors both died of plague in March 1906. The following genealogy shows the relations left by the minors:—



* Appeals from Original Decrees, Nos. 154 and 155 of 1907, against the decrees of J. C. Twidell, District Judge of Bhagalpur, dated April 9, 1907.

(1) (1864) B. L. R. Sup. Vol. 67.

(2) (1870) I. L. R. 5 Mad. 29.

(3) (1882) I. L. R. 5 Mad. 32.

(4) (1894) I. L. R. 16 All. 221.

(5) (1879) I. L. R. 4 Bom. 188.

(6) (1880) I. L. R. 5 Bom. 110.

(7) (1895) I. L. R. 19 Bom. 707.

(8) (1868) 12 Moo. I. A. 397, 436.

After Musammat Ramo's death, Makundi Lal married Musammat Tahaldai, the present appellant.

Two applications were presented to the District Judge of Bhagalpur for grant of letters of administration in respect of the estate of the deceased minors : one by Gaya Pershad and Firangi Lal as father's sister's sons, and the other by Musammat Tahaldai as widow of Makundi Lal and step-mother of the deceased minors.

The learned District Judge following the decision of the Full Bench in *Lala Joti Lal v. Durani Kower* (1) as settling the law in Bengal, granted letters of administration to Gaya Pershad and Firangi Lal (respondents).

Against this decision Tahaldai appealed to the High Court.

Moulvi Mahomed Mustafa Khan, for the appellant. The Full Bench case of *Lala Joti Lal v. Durani Kower* (1), relied on by the Court below, does not decide the present question. Although "step-mother" cannot be included in the term "mother" as used in the Mitakshara, yet, in this case, the step-mother being the widow of the *gotraja-sapinda* of the Propositus cannot be regarded as altogether excluded from the succession to her step-son's estate according to the doctrines of the Mitakshara (and Mayukha which is prevalent in Bombay): *Kesserbui v. Valab Raoji* (2), *Russoobai v. Zoolekhabai* (3).

Nanda Pandit, the author of *Dattakamimansa*, has also written a commentary on the Mitakshara of Vijnanesvara, in which he has expressly mentioned step-mother as heir. Balam Bhatta is of the same opinion: Sarbadhikary's *Tagore Law Lectures*, 1880, pages 480, 482. The *sapinda* doctrine of the Mitakshara, as laid down in the Achara-Kanda, shows that *sapinda* relationship depends on having the particles of the same ancestor in common, and not in the connection derived from the capacity of making funeral offerings: *Lallubhai Bapubhai v. Cassibai* (4). The wife entering the *gotra* of her husband becomes a *sapinda* of his family. In Madras the

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(1) (1864) B. L. R. Sup. Vol. 67.

(3) (1895) I. L. R. 19 Bom. 707.

(2) (1879) I. L. R. 4 Bom. 188, 209.

(4) (1880) I. L. R. 5 Bom. 110, 119.

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step-mother is regarded as a *bandhu* : *Kumaravelu v. Virana Goundan* (1).

In Allahabad, no doubt, a step-mother is not regarded as an heir, because she is not expressly mentioned as such in the *Mitakshara*. But the list of female heirs in the *Mitakshara* is not exhaustive. Sister is not mentioned as heir, and for a long time she was not regarded as heir ; but she is now so recognized everywhere. All these females come under the general rule of the text :—" To the nearest *sapinda* (male or female) the inheritance belongs." The same reasoning applies to the half-sister as applies to the sister. It is submitted that the appellant being a *sapinda* ought to succeed in preference to the *bandhus*, such as the respondents.

Babu Dwarka Nath Mitter, for the respondents. The question is, whether the proposition enunciated by my learned friend has been received by the particular school which governs the district to which the parties belong : see the *dictum* of the Privy Council in *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (2). Judged by this test, the claim of the other side fails. I concede that in Bombay females have higher rights than in Bengal, and sisters and others have been held to be competent to inherit, but that is because the *Vyabahara Mayukha*, which is a commentary on *Yajnavalka* regulating the law of succession in the Bombay Presidency, interprets the text of *Yajnavalka* relating to succession in favour of certain female heirs. So far as Bengal is concerned, the question of the right of a step-mother is not *res integra*, and it has been held she cannot succeed : *Lala Joti Lal v. Durani Kower* (3), decided by a Full Bench of this Court in 1864, has not been questioned ever since. On the other hand, the Allahabad High Court has followed that decision : see *Rama Nand v. Surgiani* (4).

The Privy Council have laid down that according to the received doctrines of the Bengal and Madras Schools, women are not competent to inherit unless named and specified as

(1) (1879) I. R. 5 Mad. 29, 31.

(3) (1864) B. L. R. Sup. Vol. 67.

(2) (1868) 12 Moo. I. A. 397, 436.

(4) (1894) I. L. R. 16 All. 221.

heirs by special texts: *Lallubhai Bapubhai v. Cassibai* (1). The text of Yajnavalka, Chapter II, Section 1, paragraph 2, is the only text relating to succession. There the word "mother" has been used in its primary sense and does not include a step-mother. In Viramitrodaya, Chapter III, Part 7, a text is cited from Bandhayana where women are declared to be incompetent to inherit, and the author points out that the succession of widows and others is due to express texts.

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A daughter-in-law cannot succeed her father-in-law under the Mitakshara, because she is not expressly mentioned as an heir: *Ananda Bibee v. Nownit Lal* (2). This case also shows that Ballam Bhatta is not recognized as an authority in Bengal. Viramitrodaya, which is an authority in Bengal, excludes the opinion of Nanda Pandit as quoted by my friend. Even in Bombay a sister is recognized as heir, not because, as Nanda Pandit suggests, "sister" is included in the term "brother" in Yajnavalka's text, but because she is regarded as a *gotraja-sapinda*, being born in the *gotra* of the Propositus. A step-mother can be regarded as a *gotraja-sapinda* only by fiction.

It is admitted we are *bandhus* of the last owner. We are, therefore, entitled to administration. The half-sister is not before the Court,—even if she were, it is now settled beyond controversy that she is no heir in Bengal: see Mayne's Hindu Law, 7th Edition, page 721.

Moulvi Mahomed Mustafa Khan, in reply.

BRETT AND SHARFUDDIN JJ. The present appeals are directed against a judgment of the District Judge of Bhagalpur dealing with two applications for letters of administration to the estate of two minors, Raghu Sahu and Chamru Sahu. The applicant in one of the applications was the step-mother of the two deceased minors, and the applicants in the other were the father's sister's sons of the deceased. The minors also left a half-sister by the same step-mother, but she is not a party to either of the two applications. The learned District Judge held that letters of administration could only be issued

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to the persons entitled to succeed to the property, and, on a consideration of the authorities, he was of opinion that under the Mitakshara system of the Hindu Law as interpreted in Bengal in the Full Bench case of *Lala Joti Lal v. Durani Kower* (1), the step-mother was not entitled to succeed in preference to the other applicants, the sister's sons of the father, who were admittedly the own *bandhus* of the deceased. Against this decision two appeals in respect of the two applications have been preferred to this Court by the step-mother.

In support of the present appeals, the learned pleader who has appeared on behalf of the appellant has contended that, in deciding this question of Hindu Law alluded to above, we should be guided by certain decisions of the Bombay High Court, and he suggests that, so far as the province of Bengal is concerned, the matter has not been decided by the Full Bench case (1) on which the learned District Judge has relied. He has contended that, in the Full Bench case referred to above, all that was decided was that in a divided family a step-mother could not come in as an heir of her step-son, as she was not included in the term "mother" as used in the Mitakshara when specifying the female heirs entitled to succeed. The opinion expressed in that decision does not, however, appear to us to be confined to that point alone; for the judgment runs as follows:—"For the above reasons, we are of opinion that a step-mother cannot take by inheritance from her step-son." The argument advanced by the learned pleader with reference to the right of the step-mother to succeed to the estate of her step-son is to the effect that as a *gotraja-sapinda* she is entitled to succeed in preference to the father's sister's sons, who are only *bandhus*. In support of this view, he has relied on the case of *Kesserbai v. Valab Raoji* (2), in which it has been held that a step-mother is not excluded from the inheritance, but comes in as a *gotraja-sapinda*. He next relies on the case of *Lallubhai Bapubhai v. Cassibai* (3) in support of the same view that, on marriage, the wife and the husband become

(1) (1864) B. L. R. Sup. Vol. 67. (2) (1879) I. L. R. 4 Bom. 188.

(3) (1880) I. L. R. 5 Bom. 110.

sapinda relations to each other, and, therefore, the step-mother becomes *gotraja-sapinda* of the step-son; and he also relies on the case of *Russoobai v. Zoolekhabai* (1), in which it was held that a step-mother succeeds to the property of her step-son in preference to the step-son's paternal uncle's son. He has further referred us to the opinions of Nanda Pandit as given in the principles of the Hindu Law of Inheritance by Sarbadhikary at page 480, and of Balam Bhatta as given at page 482 of the same book, and has contended that, on the basis of these authorities, we should hold in the present case that a step-mother is entitled to succeed to her step-son.

The learned pleader for the appellant has admitted that, in the case of *Kumaravelu v. Virana Goundan* (2), it has been held that neither a half-sister nor a step-mother can succeed to the estate of the step-brother or the step-son according to the Mitakshara system of the Hindu Law, and that in the same volume of the Indian Law Reports, Madras Series, in *Muttam-mal v. Vengalakshmi Ammal* (3), it has been held that a step-mother is not entitled to succeed to a deceased step-son before the maternal grand mother. He has, however, suggested that the last-mentioned decision does not go so far as to exclude the step-mother from succession altogether, as seems to have been the opinion of Mr. Mayne as expressed in his work on Hindu Law and Usage, Seventh Edition, page 730, but merely to lay down that she cannot succeed as a *sapinda*, though she may possibly succeed as a *bandhu*. The learned pleader has also admitted that, so far as the Allahabad High Court is concerned, the authorities are all in one direction and are contrary to the view which he wishes to maintain, that a step-mother can succeed to the estate of her deceased step-son. The case of *Rama Nand v. Surgiani* (4) is a direct case in point, in which, in that Court, it has been held that a step-mother cannot so succeed.

The argument, therefore, of the learned pleader in support of the present appeals amounts to this that, in dealing with

(1) (1895) I. L. R. 19 Bom. 707.

(3) (1882) I. L. R. 5 Mad. 32.

(2) (1879) I. L. R. 5 Mad. 29.

(4) (1894) I. L. R. 16 All. 221.

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the question before us, we should ignore the decisions arrived at by the High Courts of Madras and Allahabad and the Full Bench decision of this Court, and should be guided in our decision by the decisions of the Bombay High Court. We are not prepared to adopt the course which the learned pleader suggests, and which is entirely opposed to the principle which the Privy Council have laid down in the case of *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (1). In determining the question before us, it is necessary for us to be guided by the law as it has been accepted and administered in this Province. The authorities on which the learned District Judge relies seem to us to support fully the decision at which he has arrived, that, so far as this province is concerned, under the interpretation of the Mitakshara Law as accepted in the districts governed by that law, a step-mother is not entitled to succeed to the estate of her step-son either as a *gotraja-sapinda* or in preference to the father's sister's son. In arriving at this conclusion, we do not wish to lay down that the step-mother and the half-sister will not be entitled to maintenance out of the estate of the deceased. In our opinion the learned pleader has entirely failed to establish his contention that the step-mother is a *gotraja-sapinda* at all, the balance of authority being, so far as this side of India is concerned, distinctly against him, and he has also failed to show to us that, as a *bandhu*, the appellant has preferential rights to succeed to the estate of her step-son to those of the father's sister's sons.

The learned pleader has also discussed the rights of the half-sister; but, as we find that she is not a party to either of the applications, it is not necessary for us to consider her position. The result, therefore, is that both the appeals are dismissed. In the circumstances of the case, we direct that each party do bear her or their own costs.

Appeals dismissed.

D. D. B.

(1) (1868) 12 Moo. J. A. 397, 436.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

LAKHI NARAYAN GHOSE

v.

EMPEROR.*

1910
Jan. 6.

Jurisdiction of Magistrate—Cognizance on information received by him in another public capacity—Legality of the institution of criminal proceedings in such case—Criminal Procedure Code (Act V of 1898), s. 190 (1) (c).

Held per Stephen J. (Carnduff J. *dubitante*), that a Magistrate who has received information in another public capacity, *e.g.*, as manager of an encumbered estate, of the offence of mischief by cutting timber from the estate forest, cannot act on it in his capacity of a Magistrate and initiate criminal proceedings under section 190 (1) (c) of the Criminal Procedure Code.

Thakur Pershad Singh v. Emperor (1) referred to.

An order, on taking cognizance of a case under section 426 of the Penal Code, directing the attachment of trees, the subject of the alleged offence, is without jurisdiction.

THE Deputy Commissioner of Singbhum, who was the manager of the Dalbhum encumbered estate in Chaibasa, acting in such capacity, deputed one Kedar Nath Sircar, a servant of the Court of Wards, to inquire into an alleged cutting of timber belonging to the estate. The latter, after holding an investigation, made a report, on the 4th November 1909, to the Deputy Commissioner, to the effect that under the instructions or permission of one Lakhi Narayan Ghose, the dewan of Raja Satrugan Deo, proprietor of the Dalbhum estate, 15 *mahua* trees had been cut by Bahadur Gir and Dhani Ram, and were lying in different parts of village Narsingar, and that the branches of the trees had been removed to the Railway-station yard for sale as fuel. It appeared that the Raja was desirous of establishing a *hât* in the village, and that the trees had been cut for the purpose of erecting

* Criminal Revision No. 1390 of 1909, against the order of A. W. Cook, Deputy Commissioner of Singbhum, dated Nov. 6, 1909.

(1) (1906) 10 C. W. N. 775.

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huts in the *hât*. Upon the receipt of the report of Kedar Nath, the Deputy Commissioner, acting in his capacity of a Magistrate, passed the following order on the 6th November :—

"Lakhi Narayan Ghose will be prosecuted under section 426, I. P. C. Attach the 15 *mahua* trees lying near Indtar and elsewhere, including the station yard. Babu A. C. Das will arrange for disposing of them. Kedar will have the huts in the new *hât* dismantled, and the wood will be sold by the Deputy Collector."

On the 19th November the petitioner received a summons, purporting to be signed by Babu B. Sirkar, Deputy Magistrate, calling upon him to answer a charge under section 426 of the Penal Code. He thereupon moved the High Court and obtained the present Rule.

Babu Manmatha Nath Mookerjee, for the petitioner.
The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

STEPHEN J. In this case the Deputy Commissioner of Singbhum ordered a prosecution of the petitioner for wrongfully cutting certain trees in a forest, and on reading the Explanation we must take him to have done this under section 190 (1) (c) of the Criminal Procedure Code. He also ordered certain trees to be attached.

This Rule has been granted on two points. The first is that he had no authority to order the prosecution; and the second, that he had no authority to attach the trees.

As regards the second part of the Rule, it is admitted that the order was without jurisdiction, and the Rule must be made absolute.

As regards the first part, what happened is as follows. The Deputy Commissioner was also the manager of the encumbered estate, and in that capacity ordered one Kedar Nath Sirkar, a servant of the Court of Wards, to make certain enquiries. The order which is now complained of was made as the result of the report made by Kedar Nath. It is now argued, on the strength of the ruling in *Thakur Pershad Singh v. Emperor* (1), that he had no authority to do so, because,

having received the information as the manager, he could not act upon it as a Magistrate. In accordance with that ruling, I am of opinion that his action in this matter was illegal, and that the present proceedings must accordingly be quashed. The Rule is made absolute.

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CARNDUFF J. In the particular circumstances of this case, I am prepared to agree to the Rule being made absolute. It will, of course, be open to the authorities to reinstitute proceedings against the petitioner on a firmer basis, should they be so advised.

But I am not prepared to accept, without question, the ruling in *Thakur Pershad Singh v. Emperor* (1), in so far as it lays it down that a Magistrate is not competent to act under section 190 (1) (c) of the Code of Criminal Procedure on any information which has been transmitted to him in another public capacity. This clearly goes beyond the provisions of the Code itself; and I am inclined to think that the safeguards supplied by those provisions are sufficient, and that there is no adequate reason, based on general principles, for extending or amplifying them. If a Magistrate takes cognizance, under the clause referred to, on information received from any person other than a police officer, or upon his own knowledge or suspicion, then he is bound by section 191 to give the accused an early opportunity for objecting and obtaining a trial at the hands of another Magistrate. And where a Magistrate is "personally interested" in a case, he cannot, under section 556, try it, or commit it for trial, without special permission. These provisions follow the salutary rule that a Judge shall not be a Judge in what may be called his own cause: but they draw the line, advisedly as I imagine, at trial or commitment, and do not go the length of impeding mere cognizance of crime. Nor would it, in the circumstances of this country, be advisable to go so far; for, although it is undoubtedly better that a Magistrate should not move at all where he is, or has been,

(1) (1906) 10 C. W. N. 775.

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in any way himself concerned, it is not difficult to conceive cases in which there might be no one but such a Magistrate competent to act, and his incapacity to issue process might involve the escape scot-free of offenders. I should hesitate, therefore, to add to the Statute law on the subject.

Rule absolute.

E. H. M.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Fletcher.

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 Nov. 29

NAGENDRABALA DEBI
 v.
 KASHIPATI CHOWDHRY.*

Probate—Letters of Administration—High Court and District Court, Jurisdiction of—Concurrent jurisdiction—Probate and Administration Act (V of 1881), ss. 2, 51, 56, 87—"High Court," meaning of, in s. 87—Practice—Rule 740 (of the High Court Rules and Orders).

The High Court has jurisdiction to grant probate and letters of administration, on the Original Side, in any case which could have been brought before any District Judge in either of the two Provinces of Bengal.

"High Court" mentioned in section 87 of the Probate and Administration Act (V of 1881) is not merely confined to the Appellate Jurisdiction of the Court, but it includes its Original Jurisdiction.

In the goods of Mohendra Narain Roy (1), referred to.

Section 87 of the Probate and Administration Act does not require that any portion of the property should be within the limits of the Original Jurisdiction of the High Court; and Rule 740 of the High Court cannot override the express provisions of this section giving the High Court concurrent jurisdiction with the District Court.

THIS was a Rule obtained on the 4th of May 1908 by Kashipati Chowdhry and Surath Chandra Chowdhry, the first cousins (*i.e.* father's brother's sons of the deceased), calling upon Nagendrabala Debi, the executrix of the last will of the

* Motion in Original Civil Suit No. 6 of 1908.

(1) (1900) 5 C. W. N. 377.

deceased, to show cause why the grant of the probate made to her should not be revoked, and why she should not pay the costs of, and incidental to, this application.

Tara Pada Chowdhry died on the 7th of May 1900 at Barijohaty in the District of Hooghly, leaving two widows, Benoda Debi since deceased and Nagendrabala Debi, and his first cousins (that is to say father's brother's sons), Kashipati Chowdhry and Surath Chandra Chowdhry, as reversionary heirs in case of intestacy on the death of the widows. He left all his property situate within the jurisdictions of the Districts of Hooghly and 24-Pergannahs, but none within the jurisdiction of the High Court. Nagendrabala Debi obtained a probate of the will of Tara Pada Chowdhry, deceased, on the 20th November 1907 from the High Court; the applicants applied to set aside the grant of probate on the grounds, *first*, that this Court had no jurisdiction to entertain the application for probate; *secondly*, that the will was not genuine, and that no citation was issued to the applicants.

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Mr. Pugh (with him *Mr. G. D. Seal*), in support of the Rule. The Court had no jurisdiction in its Original Side to grant probate in respect of wills whereby no property was left in Calcutta. By concurrent jurisdiction, it was meant that where there were properties both in Calcutta and outside it, that the Original Side of this Court would have jurisdiction for the purpose of granting probate. By "High Court" in section 87 of the Probate and Administration Act, it was meant the High Court in its Appellate Jurisdiction.

Mr. A. C. Banerjee shewed cause, and relied upon *In the goods of Mohendra Narain Roy* (1), and cited sections 2 and 87 of the Probate and Administration Act and the Notification in the *Calcutta Gazette* of 28th April 1881, Part I, page 445, and submitted that the Original Side of this Court had ample jurisdiction to grant probate in respect of wills whereby properties; moveable or immoveable, were left within the Presidency of Bengal, concurrently with the District Judges, to whom the

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power to grant probate is delegated by the High Court, and whose jurisdiction to grant probate is confined to properties in the Districts only. *Monohur Mookerjee, In the matter of* (1), was also referred to.

FLETCHER J. In this case a preliminary point has been taken as to whether the High Court has jurisdiction under the provisions of the Probate and Administration Act to grant probate, unless a portion of the assets are situate within the limits of the Original Jurisdiction of this Court.

The sections of the Probate and Administration Act that are material are, first, section 2, which provides that "no Court in any local area beyond the limits of the town of Calcutta, Madras and Bombay, etc., and no High Court, in exercise of the concurrent jurisdiction over such local area hereby conferred, shall receive applications for probate or letters of administration until the Local Government has, with the previous sanction of the Governor-General in Council, by a notification in the Official Gazette, authorized it so to do." The notification referred to has been published in the *Calcutta Gazette* in 1881, by which this Court (that is the High Court of Calcutta) has jurisdiction to receive applications for probate and letters of administration throughout the territories subject to the Lieutenant-Governor of Bengal.

The next section necessary to call attention to is section 51. Section 51 defines the jurisdiction of a District Judge for granting probate, and the terms of that section are extremely general: and it says that "the District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district." Apparently nothing is said here as to what the cases within his district are meant to be. Then section 56 defines the cases where probate and letters of administration may be granted by the District Judge, and the cases are where the testator had at the time of his death a fixed place of abode or any moveable or immoveable property within the jurisdiction of the Judge.

Then comes section 87, which provides that "the High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge." Now the power conferred upon the District Judge is to have jurisdiction in all cases in his district, and under the general notification it is obvious that the High Court has jurisdiction in all cases in all districts of the District Judges. I think, from sections 2, 51 and 87, it is clear that the High Court has jurisdiction in all districts. That being so, so long as the petition could have been presented to any one District Court in one of the two Provinces of Bengal, this Court has, in my opinion, power to grant probate or letters of administration.

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The next point taken by Mr. Pugh is that the High Court meant here is the High Court exercising its Appellate Jurisdiction. That point has been disposed of by Mr. Justice Sale in the case of *In the Goods of Mohendra Narain Roy* (1). It is sufficient for me to say that I agree with him that the "High Court" mentioned in section 87 is not merely confined to the Appellate Jurisdiction of this Court, but includes Original Jurisdiction. The word "concurrent" could mean nothing if it applied to the Appellate Jurisdiction. In my opinion the High Court has jurisdiction to grant probate or letters of administration on the Original Side in any case which could have been brought before any District Judge in either of the two Provinces of Bengal.

The next point is as to the meaning of Rule 740 of this Court. It appears that this Rule came from archaic times: originally it was one of the Rules framed under the Charter of George III. That Rule has apparently never been altered. In those days the Supreme Court had power to grant probate or letters of administration if the testator or the intestate, if a European British subject, died within the limits of Bengal, Behar or Orissa, and also jurisdiction in the case of a person not a European British subject, if there was property within the limits of the Original Jurisdiction of the Supreme Court. That

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Rule seems to have been continued ; but the question is whether, unless the petitioner proves there is property within jurisdiction, that Rule is binding and overrides the provisions of the Probate and Administration Act giving the High Court concurrent jurisdiction in all cases. Section 87 does not require that any portion of the property should be within the limits of the Original Jurisdiction. I think these Rules cannot override the express provisions of section 87 giving the High Court concurrent jurisdiction. It is apparent that that Rule refers to 'application for probate in common form of a written and perfect will, etc., to be made by petition,' etc. It means a petition in the common form of probate, where use is made of the common allegations in the petition which is adopted as a matter of practice.

That Rule, in my opinion, does not override the practice of the High Court ; I think, therefore, the contention of Mr. Banerjee is well-founded, and hold that this Court has power to grant probate.

Attorney for the plaintiff : *N. N. Sett.*

Attorney for the defendant : *N. N. Mitter.*

PRIVY COUNCIL.

PEARY MOHUN MUKERJEE

v.

NARENDRA NATH MUKERJEE.

P. C.*
1909Nov. 17;
Dec. 16.

[On appeal from the High Court at Fort William in Bengal.]

Parties—Addition of parties—Limitation Act (XV of 1877), s. 22—Changing character of defendant after period of limitation for suit has expired—Amendment of Plaint—Civil Procedure Code (Act XIV of 1882), ss. 32, 53, 582—Suit against Debutter estate—Expenses necessary for Debutter estate—Indemnity to estate of former sebaity by successor—Liability of Debutter estate.

The parties to this litigation were the descendants of a testator, who by his will dedicated immoveable property to the performance of the worship of certain idols and other pious acts, and provided for the order of succession to the office of sebaity among his descendants. The suit was instituted on 25th January 1897 by the respondents as executors of a deceased sebaity against the appellant, who had been appointed receiver of the debutter estate, for money which, owing to interference and obstruction by the appellant in the collection of the rents, had not been received by the deceased sebaity during his sebaityship, and for expenses he had consequently been obliged to pay out of his private funds to protect the estate, and enable him to perform his obligations as sebaity. All the other surviving descendants of the testator were made parties, and the appellant was sued both in his capacity as receiver and in his personal capacity. After the expiration of the period of limitation prescribed for the suit, an amendment of the plaint was made by the Court, adding to it a prayer that it might be determined who was the sebaity, and that the debutter estate should be represented by the person declared to be entitled to the sebaityship. The appellant was found to be so entitled and was impleaded as sebaity:—

Held, affirming the decision of the High Court, that the object of the amendment was merely to determine judicially which of the living descendants of the original testator, all of whom were already parties to the suit, was to be considered sebaity. It did not alter the character of the suit, nor amount to the addition of a new defendant within the meaning of section 22 of the Limitation Act (XV of 1877), and the suit was therefore not barred.

Held, also, that the estate of the deceased sebaity was entitled to be reimbursed all sums properly expended by him in the preservation of the debutter estate (as payment of Government revenue and the like), and in defending his position as sebaity which was challenged unsuccessfully by the appellant.

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Walters v. Woodbridge (1) followed.

The respondents were also entitled to recover all moneys properly expended by the deceased sebaity in performing the obligations imposed upon him by the original testator's will. The right of indemnity was incident to the position of a trustee, and the liability in respect of that indemnity was the first charge on the trust estate.

APPEAL from a judgment and decree (24th February 1905) of the High Court at Calcutta which affirmed a decree (30th June 1903) of the Subordinate Judge of Hooghly.

The principal defendant was the appellant to His Majesty in Council.

The suit, out of which this appeal arose, was instituted on 25th January 1897 by the respondents as executors of a deceased sebaity to recover the sum of Rs. 77,964-9-6 from the debuttar estate to which the defendant (appellant) had succeeded as sebaity, or in the alternative from the defendant himself personally.

The facts of the case will be found fully stated in the report of it before the High Court (GHOSE and PARGITER JJ.) in I. L. R. 32 Calc. 582.

On this appeal,

Sir R. Finlay, K.C., DeGruyther, K.C., and A. M. Dunne, for the appellant, contended that at the date of the addition of the appellant as a defendant in his capacity of sebaity the suit was barred by limitation. Making him a defendant in a new capacity was equivalent to adding a new party defendant: it was an amendment of the plaint which made a change in the character of the suit, and the addition as a party defendant of the idol, who was not a party before. The six years' period of limitation provided by Article 120 of Schedule II of the Limitation Act (XV of 1877) was applicable to the suit. The amendment was made on 8th July 1901, more than six years after the death of Bijoy Krishna Mukerji, when the cause of action originally arose; and the suit must be deemed to have been instituted against the appellant, in his capacity as sebaity, for the first time at the date of the amendment.

The Court had no power to extend the period of limitation, and the suit was therefore barred. Reference was made to the Limitation Act, section 22, and Schedule II, Article 57; and Civil Procedure Code (Act XIV of 1882), sections 32, 53, 562 to 566 and 582.

It was also contended that the debuttar estate was not liable for the costs or expenses incurred by Bijoy Krishna Mukerji in suit No. 40 of 1892, nor in connection with the other civil and criminal cases and proceedings instituted by him; that Bijoy Krishna Mukerji had no right or authority under the will of Jaga Mohun Mukerji, or otherwise, to incur such expenditure on behalf of the debuttar estate; and that such expenditure by him, and after his death by the respondents, ought to have been held to be voluntary payments and not chargeable against the debuttar estate. There was no justification for expenditure to a greater extent than what was received. As to the position of a sebaite in such a case, reference was made to *Shibessouree Debia v. Mothooranath Acharjo* (1). The expenditure must be shown to have been necessary.

Cohen, K.C., and *Ross*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a decree of the High Court of Calcutta affirming a decree of the Subordinate Judge of Hooghly.

Dec. 16.

In the Court of first instance the present respondents were plaintiffs. The suit was brought by them as executors of Bijoy Krishna Mukerji, who was sebaite of a debuttar estate for nearly four years, to recover Rs. 77,964-9-6 alleged to be due to him in that capacity, either from the estate or from the principal defendant, the present appellant, personally.

The history of the litigation is shortly as follows :—

Jaga Mohun Mukerji, who died in 1840, by will dedicated certain properties to the sheba, or worship, of two Thakurs, or idols, the annual celebration of Durgapuja and other pious

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acts, and provided for the order of succession to the office of sebaity among his own descendants.

The first sebaity was the appellant's father. He was succeeded by his step-brother, who died in September 1890. On his death the succession opened to Bijoy Krishna Mukerji.

Bijoy's succession was opposed by the present appellant, who threw every possible difficulty in the way of his obtaining possession of the estate and collecting the rents.

Finally, Bijoy brought a suit, No. 40 of 1892, in the Court of the Subordinate Judge of Hooghly, to establish his title to the office of sebaity under the testator's will.

On the 29th of January 1894 the Court decided in Bijoy's favour. Bijoy died on the day on which the decree was made. By his will he appointed the present respondents his executors, and on the 2nd of March 1894 they obtained probate.

On the 25th of January 1897 the respondents brought the present suit against the appellant, who had been appointed receiver of the debuttar estate, both in his capacity of receiver and in his personal capacity. All the surviving descendants of the original testator were made defendants. The respondents as plaintiffs alleged that, owing to the interference of the appellant and his persistent opposition, Bijoy was not able to recover more than Rs. 4,607 odd during his incumbency, while he was compelled to spend Rs. 71,572 odd out of his private funds in protecting the debuttar estate and performing his obligations as sebaity, and that after Bijoy's death they had to pay a further sum on account of the debts of the estate. In the result they claimed the sum of Rs. 77,964-9-6 from the estate, or in the alternative from the appellant personally.

The appellant defended the suit, alleging, among other things, that the claim was barred by limitation, and that neither he nor the estate was under any liability to Bijoy's executors.

On the 17th of February 1899 the Subordinate Judge made a decree determining that the claim was not barred by limitation. He held that the appellant was liable personally

so far as he had realised moneys belonging to the estate, and that, as regards the rest of the claim, the debuttar estate was liable for such costs and losses as on enquiry by a commission should be found to be reasonable. The appellant appealed to the High Court. On the 28th of November 1900 the High Court held that the claim against the appellant personally could not be maintained. As regards the rest of the claim, the learned Judges were of opinion that it was not barred. But although every possible claimant to the office of sebaity was a party to the suit, they thought that the debuttar estate was not properly represented, and they remanded the suit in order that the prayer of the plaint might be amended, so as to raise directly the question as to the right to the office of sebaity, and the representation of the estate.

On remand, the Subordinate Judge came to the conclusion that the appellant must be considered to be the sebaity, and, as such, the proper person to represent the estate. He directed that two commissioners should be nominated to enquire into and report upon the expenditure in question with liberty to state their own opinion in regard to the liability of the appellant as sebaity.

On the 16th of March 1903 the commissioners so appointed submitted their report. After a detailed examination of the several matters referred to them, they stated that, in their opinion, the sum of Rs. 49,139 odd was due to the plaintiffs. Both parties filed objections. On the 30th of June 1903 the Subordinate Judge delivered his final judgment, to the effect that the amount found due by the commissioners should be reduced to Rs. 45,960-11-10. He held that that sum was recoverable from the debuttar estate then in the hands of the appellant as sebaity.

Both parties again appealed. On the 24th of February 1905 the High Court affirmed the decree of the Subordinate Judge and dismissed both the appeal and the cross-appeal with costs.

From that order the appellant has appealed to His Majesty in Council.

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On the hearing before this Board, the learned counsel for the appellants raised two points. They contended (i) that the suit was barred by limitation, and (ii) that the estate of Bijoy was not entitled to be reimbursed out of the debuttar estate expenditure incurred by Bijoy as sebaite in excess of his actual receipts from the property.

As regards the first question, their Lordships are of opinion that the appropriate period of limitation is the period of six years from the date of Bijoy's death, and that the suit, therefore, was instituted in time, inasmuch as the amendment directed by the High Court did not alter the character of the suit and no new defendant was brought on the record. The object of the amendment was to determine judicially which of the living descendants of the original testator, all of whom were already parties to the suit, was to be considered sebaite.

As regards the question of reimbursement, it is quite clear, and indeed it was hardly disputed, that Bijoy's estate was entitled to be reimbursed all sums properly expended by him in the preservation of the trust estate, as for instance all moneys paid in respect of Government revenue and the like. It is equally clear that Bijoy's estate is entitled to be reimbursed all moneys properly expended by him in defending his position as sebaite, which was challenged unsuccessfully by the appellant. If any authority is wanted for this proposition it will be found in *Walters v. Woodbridge* (1). As regards the other items of expenditure, their Lordships are of opinion that Bijoy's estate is entitled to be reimbursed all moneys properly expended in performing the obligations imposed upon him by the original testator's will. The right of indemnity, as has often been said, is incident to the position of a trustee. The liability in respect of that indemnity is the first charge on the trust estate. The only question is, was Bijoy, as trustee, justified in incurring the expenditure for which his executors now claim reimbursement? It was contended by the learned counsel for the appellant that Bijoy was not justified in spending, as sebaite,

more than he actually received, and that he ought to have managed the trust so economically, that at his death, whenever it might happen, there should be no outstanding claim against the trust estate. This objection is somewhat ungracious, if not absurd. There is no foundation for it in the will. The average income of the trust estate on which Bijoy might fairly have calculated was Rs. 10,000 a year. During the whole period of his incumbency he received less than Rs. 5,000. The diminution of income was due entirely to the appellant's wrongful acts. It was not unreasonable to expect that, on the cessation of those acts, or on the interposition of the Court which Bijoy invoked, the income would be sufficient to defray the expenditure incurred in the meantime in maintaining the religious observances prescribed by the founder of the trust.

Their Lordships see no reason to differ from the High Court. They will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant : *T. L. Wilson & Co.*

Solicitors for the respondents *Watkins & Lempriere.*

J. V. W.

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CRIMINAL REVISION.

Before Mr. Justice Chatterjee and Mr. Justice Ryves.

1909
 {
 Oct. 1.

INDER RAI

v.

C. R. BROWN.*

Cross-examination—Prosecution witnesses, cross-examination of, after charge—Failure to name, on date of the charge, the witnesses required for cross-examination—Subsequent application before close of the case—Right of cross-examination, continuance of—Waiver—Criminal Procedure Code (Act V of 1898), s. 256.

Section 256 of the Criminal Procedure Code merely lays down that after the plea of the accused is taken he shall be required to state whether he wishes to cross-examine any, and if so which, of the prosecution witnesses whose evidence has been taken, but it does not state at what particular time he is to be asked this question, nor up to what time he has this right.

Where, therefore, the accused were asked, on the day the charges were framed, whether they would call any of the prosecution witnesses for cross-examination and did not name any, but made an application to re-call some of them for that purpose on the next Court day and before the case had closed—

Held, that they were entitled to have the prosecution witnesses re-called for the purpose of cross-examination, and that there was no waiver of their right under the section.

THE petitioners, Inder Rai and others, were put on their trial before Mr. J. S. Mackay, Sub-divisional Officer of Hajipur, for rioting armed with deadly weapons and voluntarily causing hurt by dangerous weapons, in pursuance of the common object, to certain factory labourers who had gone to the petitioner, Inder Rai, in order to demand their wages due from him. The prosecution witnesses were examined and cross-examined by the mukhtars for the accused, and thereafter, on the 8th April 1909, the Sub-divisional Officer framed charges against the petitioners under sections 148 and $\frac{3}{4}$ of the Penal Code. Immediately after the charges had been read and explained to the accused,

* Criminal Revision No. 1079 of 1909, against the order of J. W. Ward, Sessions Judge of Mozufferpore, dated June 29, 1909, modifying the order of J. S. Mackay, Sub-divisional Magistrate of Hajipur, dated May 25, 1909,

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who pleaded not guilty, they were asked by the Magistrate to name the prosecution witnesses whom they wished to cross-examine; but they failed to do so. The case was then postponed to the 28th instant. From the 9th to the 13th April the Court was closed for the holidays. When the Court re-opened on the 14th, the accused applied to the Magistrate to re-call five of the prosecution witnesses for cross-examination, but their application was rejected on the next day. The application was renewed on the 28th, but disallowed. The Magistrate passed the following order thereon :—

The accused were asked, immediately after the charge was framed, to state whether they wished to cross-examine any, and if so which, of the prosecution witnesses who had been examined. They did not exercise that right at once as they ought to have done, but put in a petition on the 14th April, *i.e.*, 7 days after the charge, to have certain witnesses recalled and cross-examined which I rejected. Under the law, I think, the accused are required to state, immediately after the charge is framed, whether they wish to exercise their right, and if they do not, I don't think they are at liberty to come forward some days after to claim the right. The accused have had ample opportunity of cross-examination before the charge was framed, and their present application has simply been put in for the purpose of vexation to the prosecution witnesses and delay in the proceedings; so I reject the application.

The accused were convicted on the 25th May, under the above-named sections of the Penal Code, and sentenced to nine months' rigorous imprisonment. The Sessions Judge of Mozufferpore on appeal, by his order dated the 29th June, altered the conviction and reduced the sentences of some of the petitioners. They then moved the High Court and obtained the present Rule.

Babu Harihar Prosad Singh, for the petitioners.

No one for the opposite party.

CHATTERJEE AND RYVES JJ. We think that this Rule ought to be made absolute. The Magistrate says that the petitioners were asked at the time of framing the charge whether they would call any of the prosecution witnesses for cross-examination, but they could not at that instant make any answer to his question. They did, however, subsequently

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apply for re-calling some of the witnesses for the prosecution for the purpose of cross-examination, and the Magistrate thought that, since the defence was conducted by two mukhtears who had cross-examined the prosecution witnesses before the charge, it was not necessary to give them a further chance of cross-examination, and that the petitioners had waived their right by not answering when called upon. This is, however, against both the wording and the spirit of the law. Section 256 of the Criminal Procedure Code only says that the accused shall be required to state whether he wishes to cross-examine any, and if so which, of the witnesses whose evidence has been taken. It does not say at what particular time he is to be asked this question and up to what time he has this right. In this case an application had been made before the case had closed, and we think that the petitioners were entitled to have their prayer granted. The conviction, therefore, must be set aside. Under the circumstances, as all the petitioners, except one, have served out their sentences, and the other almost the whole sentence, there need not be any re-trial. The order under section 106 is also set aside.

Rule absolute.

E. H. M.

PRIVY COUNCIL.

MAUNG THA HNYIN

v.

MAUNG MYA SU.*

P. C.*
1909Nov. 9;
Dec. 2.

[On appeal from the Chief Court of Lower Burma.]

*Title—Priority of Title—Mortgagor and Mortgagee—Deposit of Title Deeds—
Right to decree for Foreclosure—Equity of Redemption—Sale of right, title,
and interest of Mortgagee at Court sale in execution of decree.*

This was a case of contested title to two plots of land near Moulmein. The title of the plaintiff (appellant) was that by deed of 26th July 1890 (Ex. B) the property was mortgaged to a firm who, by deed of transfer dated 8th November 1894 (Ex. A), assigned the mortgage debt and transferred the security for it to one A R, and he, in October 1895, deposited the title deeds with the plaintiff by way of equitable mortgage. In 1901 the plaintiff enforced the mortgage by suit against A R, and on 31st December of that year obtained a decree for sale in default of payment, in pursuance of which the right, title and interest of A R in the property comprised in the above title deeds were sold by auction, and the plaintiff, who bid by leave of the Court, became the purchaser, a certificate to that effect under the hand and seal of the Court being endorsed on Ex. A. The other title was set up by a person who was not one of the original defendants (the mortgagors of 1890), but a person added as a party defendant by consent subsequently to the filing of the suit. He stated that, after the assignment to A R of the mortgage debt, the original mortgage was satisfied by the mortgagors making over the mortgaged property to A R, who by deed dated 14th March 1895 mortgaged it to the defendant, and he brought a suit on the mortgage, and on 21st July 1902 obtained a decree for payment in six months or foreclosure, and, on default being made, became absolute owner of the property. The District Judge found (issue 2) that the mortgaged property was not made over to A R in satisfaction of the mortgage debt, and so holding, thought it unnecessary to decide issue 3, "Did A R mortgage the property to the defendant?" and issue 4, "Did the property, by virtue of the decree of 21st July 1902, become the absolute property of the defendant?" He held that the plaintiff had acquired the rights of the original mortgagee in the property under Ex. B, and gave him a mortgage decree with interest. On appeal, the Chief Court reversed that decision, substantially on the ground that A R had no interest in the property at the date of the sale to the plaintiff. It was pointed out (*inter alia*) on appeal to the Judicial Committee that the mortgage of 14th March 1895 was a usufructuary mortgage on which the defendant had no legal right to a decree for foreclosure; that that mortgage, by

* *Presen* : LORD MACNAGHTEN, LORD COLLINS, LORD SHAW and SIR ARTHUR WILSON.

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reason of the defendant being himself only a mortgagee, the equity of redemption being outstanding in the original mortgagors, was beyond the power of the defendant to grant and was therefore void; that the plaintiff was not a party to the decree of 21st July 1902, and therefore could not be affected by it; and that, notwithstanding the alleged mortgage of 1895, the title deeds remained in the possession of A R.

Their Lordships were of opinion that the decision of the Chief Court was untenable, and finding that it was impossible to pronounce a final judgment without serious risk of doing injustice to one or other of the two parties principally concerned, allowed the appeal, set aside the decrees of the lower Courts, and remanded the suit to the District Judge for findings on issues 3 and 4, with an inquiry as to the priority between the plaintiff and the defendant, and for retrial.

APPEAL from a judgment and decree (23rd April 1907) of the Chief Court of Lower Burma on its Appellate Side, which reversed a judgment and decree (3rd October 1905) of the Court of the District Judge of Amherst.

The plaintiff was the appellant to His Majesty in Council.

The main question for determination in this appeal was one between the plaintiff (the present appellant) and the defendants (respondents 9, 10 and 11), the representatives of one Abdul Guffoor (Ma Satha Pu, his widow, and Ismail and Khatiya Bi, his two children), and concerned the title to two plots of land at Moulmein in Lower Burma, numbered 1 and 2 in the record.

The plaint in the suit, out of which the appeal arose, which was filed on 12th May 1903, alleged that by a deed dated 26th July 1890 (Exhibit B), plots 1 and 2, and two others numbered 3 and 4, were mortgaged by the owners (now represented by respondents 1 to 8 in the appeal) to a firm of M. M. R. M. Chetty to secure a loan of Rs. 11,000 and interest, and that by a deed of transfer dated 8th November 1894 (Exhibit A) that firm assigned for valuable consideration to one Abdul Rahman the whole of their right, title and interest in the above-mentioned loan and mortgage. In the 5th paragraph of the plaint it was stated that "the plaintiff obtained a decree against Abdul Rahman in Civil Regular Suit No. 77 of 1901 of the District Court of Amherst, and in execution of that decree the above-mentioned mortgage and the principal money and interest due thereunder were attached and put up for sale by auction, and

at such sale were sold to the plaintiff, and the right, title and interest of the mortgagee was transferred by endorsement upon the instrument of transfer." That decree was dated the 31st December 1901, and the sale to the plaintiff, who had permission from the Court to bid, was on 28th August 1902. It was further stated in the plaint that a portion of the mortgaged property, namely plots 3 and 4, had already been sold by Abdul Rahman; and the plaintiff asked for an account, an order for payment, and consequential relief.

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The written statements in the interest of the original defendants were not relevant to the present appeal; but that of Abdul Guffoor (who was joined as a defendant by order of the Court, dated 7th August 1903, on the petition of Abdul Rahman), alleged that the original mortgagors made over the whole of the mortgaged property absolutely in satisfaction of the debt to Abdul Rahman, who on 14th March 1895 joined with one Emam Sahib in mortgaging that (together with other) property to him, Abdul Guffoor; and that on 21st July 1902 in a suit No. 118 of that year a foreclosure decree was made by the Amherst District Court in his favour in default of payment of the mortgage debt and interest and costs within six months from the date of the decree; that such default was made and that thereupon he, Abdul Guffoor, became absolute owner of the plots of land mortgaged, with possession. Abdul Guffoor therefore denied that Abdul Rahman had any interest in the said plots of land at the date of his sale to the appellant by order of the Court.

The issues raised on these pleadings, so far as they are now material, are set out in their Lordships' judgment.

The District Judge found that in October 1895 Abdul Rahman deposited his two title deeds, namely, the mortgage deed of 26th July 1890, and the deed of transfer dated 8th November 1894, with the plaintiff as additional security for advances of money made to him by the plaintiff. And it appeared from the documentary evidence that the mortgage of the 14th March 1895, executed by Abdul Rahman in favour of Abdul Guffoor, was a usufructuary mortgage (the equity of redemption

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in the original mortgage still remaining in the original mortgagors), the conditions of which were that Abdul Guffoor, the mortgagee, was to be put into possession and take the rents and profits in lieu of interest, the amount of the principal continuing unaffected. It also appeared that the original mortgagors were not parties to the suit brought on that mortgage.

The documentary evidence also showed that on 14th August 1902 Abdul Rahman brought a suit (No. 159 of 1902) against the plaintiff for a declaration that the original mortgage of 26th July 1890, and the deed of transfer of 8th November 1894, were not included in the decree of 31st December 1901 in suit 77 of 1901 ; but that suit was dismissed on 26th August 1902, the Court holding that those deeds and the property to which they related were clearly included in the decree in favour of the plaintiff in the mortgage suit.

Of the issues relevant to this appeal, namely, issues 2, 3, 4, 5 and 7, the District Judge held on the 2nd issue that there was no evidence to prove that the mortgaged property after the assignment was transferred to Abdul Rahman absolutely in satisfaction of the mortgage debt ; but that Abdul Rahman stepped into the shoes of the Chetty firm, the original mortgagees, and acquired no better title than they had. After that finding, the District Judge was of opinion that it was unnecessary to deal with issues 3 and 4 ; but as the plaintiff had waived his claim to any lien on plots 3 and 4, and as the 2nd issue had been decided in the negative, he held on the 5th issue that the plaintiff had acquired the rights of the original mortgagees as contained in Exhibit B in respect of plots 1 and 2. As to issue 7, he found that the plaintiff was entitled to a mortgage decree in respect of plots 1 and 2 to the extent of Rs. 11,000 with interest at 1 per cent. per mensem from the date of the execution of Exhibit B, namely, 26th July 1890, together with costs on that amount.

The defendants, the representatives of Abdul Guffoor, preferred an appeal from that decision to the Chief Court, which was heard by Mr. C. E. Fox (Chief Judge) and Mr. H. S. HARTNOLL (Judge), who reversed the decree of the District

Judge mainly on the ground that at the date of the sale of the property to the plaintiff, Abdul Rahman had no interest in it, either as owner or as mortgagee, he having already parted with it by the mortgage of 14th March 1895 to Abdul Guffoor. The material portions of the judgments were as follows :—

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Mr. Fox said :—

“ These defendants appeal on the ground, amongst others, that the Judge should have decided the 2nd issue in their favour, and that he should have come to a finding on the 3rd and 4th issues, and such findings should have been in their favour.

“ I am not prepared to hold that the Judge decided the 2nd issue wrongly, but his finding that the mortgaged property was not made over to Abdul Rahman in satisfaction of the debt afforded no ground for not deciding the 3rd and 4th issues.

“ The mortgage deed of the 14th March 1895, by which Abdul Rahman mortgaged the properties in suit to Abdul Guffoor, is filed in Suit No. 118 of 1902, in which Abdul Guffoor obtained his foreclosure decree. No doubt Abdul Rahman purports by it to transfer the land as owner ; but if he was only mortgagee, the deed operated to transfer his interest as mortgagee. The rule is expressed in section 8 of the Transfer of Property Act, thus—‘ Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferer is then capable of passing in the property, and in the legal incidents thereof.’

“ It was argued in this Court that the mortgage to Abdul Guffoor was collusive and fraudulent, but no such question was raised in the District Court, nor was the fact that the mortgage deed had been executed contested. In such a case it seems unnecessary to remand the case for a finding on the 3rd and 4th issues. The deed was executed and registered long before the plaintiff bought ; whatever he did buy, in execution of his decree against Abdul Rahman, and consequently the latter at the time of the sale had no interest in the property in suit either as owner or mortgagee. The plaintiff then did not stand in the shoes of the original mortgagee, and he had no right to proceed against the property in suit or against the surviving original mortgagor, and legal representatives of the other mortgagors, or against any one now interested in the properties.

“ I would allow the appeal, and would reverse the decree of the District Court, and dismiss the suit and order the plaintiff to pay the appellants’ costs in the District Court and in this Court. As the ground that the plaintiff had no rights as mortgagee was common ground to all the defendants, the decree of the District Court should, under section 544 of the Code of Civil Procedure, be reversed and set aside as against all the defendants.”

Mr. Hartnoll said :—

“ Maung Tha Hnyin bought at the Court sale on 28th August 1902 the right, title and interest of Abdul Rahman in the properties, the subject of the present suit. This right, title and interest seems to have been the

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interest Abdul Rahman secured by the assignment to him of the mortgage deed of 26th July 1890, subject to a further charge of Rs. 6,000 created on the property by himself on 14th March 1895, and with regard to which a decree dated 21st July 1902 was then existing. Maung Tha Hnyin must be held, in my opinion, to have stood in Abdul Rahman's shoes in every respect. He did not satisfy the decree, and so by the terms of it he lost all interest that he obtained in the property by his purchase at the Court sale on 21st January 1903. I am, therefore, of opinion that he cannot now sue in respect of it on the case that he now sets up.

"At the hearing of the appeal it was suggested that the deed of the 14th March 1895 was a fraudulent one, and, further, that section 78 of the Transfer of Property Act should be considered. These matters were not part of Maung Tha Hnyin's case and are not mentioned in the pleadings, and in my opinion they cannot now be raised. Maung Tha Hnyin sued as the auction-purchaser of Abdul Rahman's right, title and interest and on that alone.

"I therefore concur in the order proposed by the learned Chief Judge."

On this appeal, which was heard *ex parte*,

J. W. McCarthy, for the appellant, contended that the Chief Court was wrong in holding that the case of the appellant was confined merely to his position as decree-holder; his full titles to the property in suit as equitable mortgagee, holder of foreclosure-decree, and purchaser at public auction with conveyance by the Court, were stated in paragraph 5 of the plaint by reference therein to the record of his suit for foreclosure, and were in issue in the present suit. But even if his title were limited, as held by the Appellate Court, it was complete as against the original mortgagors, and neither Abdul Rahman nor Abdul Guffoor had any better title. The appellant's title ought, under the circumstances of the case, to have priority over that of Abdul Guffoor, (a) because he had so dealt with the title-deeds as to enable the mortgagor to obtain advances from the appellant, and was thereby guilty of gross neglect within the meaning of section 78 of the Transfer of Property Act; (b) because the appellant, by the purchase of the property in suit at the Court sale, and by getting it conveyed to him by the Court, acquired a complete title to it independently of his titles as equitable mortgagee and decree-holder; and (c) because Abdul Guffoor, as usufructuary mortgagee, had no legal right to a foreclosure-decree which he had only obtained by collusion with Abdul Rahman who omitted

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to make the appellant a party to the proceedings, and thereby concealed from the Court the fact that it had a year previously made a similar decree in favour of the appellant, and had thus allowed Abdul Guffoor to obtain a decree to which he was not in law or fact entitled. Moreover, Abdul Rahman being only a mortgagee, with the equity of redemption outstanding in the original mortgagors, could not grant a mortgage of the same premises to another person; such mortgage was, therefore, invalid and void; and under the circumstances, section 8 of the Transfer of Property Act had no such effect as the Appellate Court had wrongly held it to have; the original mortgagors, moreover, were not made parties to those proceedings, and their interests were, therefore, not affected by the decree of 21st July 1902. The interests of all parties in the property in suit were merged in the decree for foreclosure and sale in favour of the appellant in suit 77 of 1901; and the only remedy of Abdul Guffoor was against Abdul Rahman on the personal covenant in the mortgage of March 14th, 1895, or to get the judgment set aside, which he had not done, whilst Abdul Rahman's attempt to do so had been unsuccessful.

The judgment of their Lordships was delivered by
LORD MACNAGHTEN. This is an appeal in a mortgage suit.
It was heard *ex parte*.

Dec. 2.

It is the appeal of the plaintiff from a judgment and decree of the Chief Court of Lower Burma on its Appellate side, reversing a judgment and decree of the Judge of the District Court of Amherst, which was in the plaintiff's favour, and dismissing his suit with costs.

Owing to the confused state of the record and the manner in which the case was presented to the Courts below, their Lordships have felt more than the ordinary difficulty, which attends an *ex parte* hearing, in dealing with the materials placed before them. They find it impossible to pronounce a final judgment without serious risk of doing injustice to one or other of the two parties principally concerned.

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Some of the facts are beyond dispute.

On the 26th of July 1890, four persons, who are all dead and are now represented by the first eight respondents, mortgaged four plots of ground, Nos. 1, 2, 3 and 4, in or near Moulmein, to the firm of M. M. R. M. Chetty for the purpose of securing Rs. 11,000 and interest. The mortgage is Exhibit B.

On the 8th of November 1894, the Chetty firm assigned the mortgage debt and transferred the security for it to one Abdul Rahman. The transfer is Exhibit A.

In October 1895, Abdul Rahman deposited the title-deeds of the mortgaged property (Exhibits A & B) with the plaintiff by way of equitable mortgage.

In 1901 the plaintiff brought a suit (No. 77 of 1901) against Abdul Rahman, Abdul Rahman's father Emam Sahib, and others, to enforce certain mortgage securities, including that created by the deposit of Exhibits A and B.

On the 31st of December 1901, the District Court of Amherst found that the deposited title-deeds were held by the plaintiff by way of equitable security, and a decree for sale was pronounced in default of payment. Payment was to be made before the 10th of July 1902.

In pursuance of this decree, the right, title and interest of Abdul Rahman in the property comprised in the deposited deeds, Exhibits A and B, were put up for sale on the 28th of August 1902. The plaintiff, who had the leave of the Court to bid, was declared the purchaser for Rs. 5,000. A certificate to that effect, under the hand of the District Judge and the seal of the Court, was endorsed on Exhibit A.

So far there seems to be no room for dispute, and if it had not been for a claim put forward on behalf of one Abdul Guffoor, whose brother was married to Abdul Rahman's sister, the decree of the District Court would seem to have been substantially right under the circumstances.

Abdul Guffoor's claim was brought on the record in the following manner. On the present suit being instituted, Abdul Rahman presented a petition, asking that he and Abdul Guffoor might be made parties. His story was that, after the

assignment to him of the mortgage debt, the mortgage was satisfied by the mortgagors making over to him all the mortgaged property, and that he mortgaged the property No. 2 to Abdul Guffoor, who filed a suit against him, obtained a decree for foreclosure, and thus became the owner of the property.

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By consent, Abdul Guffoor was added as a defendant. He put in a written statement, in which he alleged that Emam Sahib and Abdul Rahman, as owner, mortgaged to him, amongst other property, plots 1 and 2 by a registered deed dated the 14th of March 1895; that he brought a suit for foreclosure (No. 118 of 1902); that a decree was passed in his favour for payment or foreclosure; that default was made in payment; and that he thus became the absolute owner of the mortgaged property.

No amendment was made in the statement or in the prayer of the plaint in consequence of Abdul Guffoor being added as a defendant.

The following issues, with others which are not now material, were framed by the Judge:

- i. Was Exhibit B executed by the parties named as mortgagors?
- ii. Was the mortgaged property made over to Abdul Rahman in satisfaction of the debt?
- iii. Did Abdul Rahman mortgage properties 1 and 2 to Abdul Guffoor?
- iv. Did this property, by virtue of the decree in No. 118 of 1902, become the absolute property of the defendant Abdul Guffoor?
- v. What rights, if any, did the plaintiff acquire by his purchase of the bonds, Exhibits A and B?
- vi. To what relief is the plaintiff entitled?

On the 3rd of October 1905, the District Judge delivered judgment. He found that Exhibit B was duly executed, and that the mortgaged property was not made over to Abdul Rahman in satisfaction of the mortgage debt.

Abdul Guffoor, though represented by counsel at the hearing, did not offer himself as a witness, nor was there any

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evidence on his behalf beyond the production of the registered deed of the 14th of March 1895, and the decree in the suit No. 118 of 1902, dated the 21st of July 1902. He seems to have rested his case on Abdul Rahman's story, which was disbelieved, and not to have claimed the rights of a mortgagee in any event. As he did not go into the witness-box, there was no explanation of the fact that, notwithstanding the alleged mortgage to him, the title-deeds, Exhibits A and B, were left with Abdul Rahman, a circumstance which, unexplained, would justify the postponement of his security, if any, to the security of the plaintiff created by the deposit of those deeds.

It is to be observed that the suit No. 118 of 1902 was instituted early in the month of July 1902. The decree was made by consent on the 21st of that month. Now, the 10th of July 1902 was the date fixed for payment in the plaintiff's suit No. 77 of 1901. It is difficult to imagine that Abdul Guffoor was in ignorance of what had been done in that suit. There seems to be ground for supposing that the suit No. 118 of 1902 was instituted for the purpose of defeating the decree in the suit No. 77 of 1901, in so far as it related to Exhibits A and B. However that may be, it is material to bear in mind that the plaintiff was not made a party to No. 118 of 1902, nor was the decree served on him, and therefore his rights, whatever they may have been, remained unaffected by the decree in that suit.

In August 1902 Abdul Rahman, who, according to his own account, had at the time no interest in the mortgaged property, brought a suit, No. 159 of 1902, against the plaintiff, to have it declared that the mortgage of the 26th of July 1890, Exhibit B, and the assignment of the 8th of November 1894, Exhibit A, did not form any portion of the mortgaged property affected by the decree in No. 77 of 1901. On the 28th of August 1902, suit No. 159 of 1902 was dismissed with costs.

The learned Judge of first instance, dealing with the present case, was of opinion that, as issue No. 2 had been decided in the negative, there was no need to go into issues Nos. 3 and 4, and, after observing that the plaintiff had waived his claim to any lien on properties 3 and 4, decided that the plaintiff had

acquired the rights of the original mortgagee, as contained in Exhibit B, in respect of properties 1 and 2, and he came to the conclusion that the plaintiff was entitled to a mortgage decree on properties 1 and 2 to the extent of Rs. 11,000 with interest. As it was not asserted by any of the defendants that any portion of the principal and interest due on the mortgage, Exhibit B, had been paid, the learned Judge did not think it necessary to direct an account of what was due on the mortgage, though it was asked for by the plaintiff.

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From this decree the representatives of Abdul Guffoor, who was then dead, alone appealed. Judgment on the appeal was given on the 23rd of April 1907. The Chief Judge did not dissent from the judgment of the Court below on issue No. 2; but he held that the deed of the 14th of March 1895—which, on the face of it, appears to be a mortgage by an owner in fee, and was at most a sub-mortgage, as Abdul Rahman was not the owner of the property, but transferee of the mortgage, Exhibit B—operated to transfer to Abdul Guffoor the whole right and interest of Abdul Rahman in the mortgage, Exhibit B, assigned to him by Exhibit A. “The deed,” he observes—that is, the deed of the 14th of March 1895—“was executed and registered long before the plaintiff bought whatever he did buy in execution of his decree against Abdul Rahman, and consequently the latter at the time of the sale had no interest in the property in suit either as owner or mortgagee.”

That view seems to their Lordships to be quite untenable. Indeed, it does not appear to have been suggested by anybody at the hearing before the Chief Court.

The view of Hartnoll, J., who was the other Judge in the Chief Court, was not the same as that of the Chief Judge, but it seems to be equally untenable. He thought the plaintiff must be “held to have stood in Abdul Rahman’s shoes in every respect.” “He did not,” the learned Judge adds, “satisfy the decree,” that is, the decree of the 21st of July 1902, “and so by the terms of it he lost all interest that he obtained in the property by his purchase at the Court sale on the 21st January 1903.” The sale was on the 28th of August 1902. The error

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in date is immaterial. But it is difficult to see how the plaintiff could be barred or affected by a decree in a suit to which he was not a party.

Their Lordships are, therefore, of opinion that the judgment of the Chief Court should be reversed with costs to be paid by the appellants in that Court, the representatives of Abdul Guffoor, the decree of the District Judge discharged, and the suit remanded to the District Judge for findings on issues 3 and 4, with an enquiry as to priority between the plaintiff and Abdul Guffoor and for retrial. The District Judge will deal with the costs not dealt with by this judgment.

Their Lordships will humbly advise His Majesty accordingly.

The last three respondents, the representatives of Abdul Guffoor, who alone appealed to the Chief Court, will pay the costs of the appeal.

J. V. W.

Appeal allowed.

Solicitors for the appellants : *Bramall & White.*

CRIMINAL REVISION.

Before Mr. Justice Mookerjee and Mr. Justice Chatterjee.

JADU NANDAN SINGH

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Jurisdiction of Criminal Court—Order directing prosecution for instituting a false case—False information to the police—Subsequent complaint before the Magistrate—Grounds of the exercise of such jurisdiction—Criminal Procedure Code (Act V of 1898), ss. 195 (b) and 476.

Section 476 of the Criminal Procedure Code must be read subject to the restrictions contained in section 195 (b), and does not, therefore, empower a Court to direct a prosecution for making a false charge before the police.

Dharmadas Kavar v. King-Emperor (1) followed.

* Criminal Revision No. 1019 of 1909, against the order of H. Foster, Sessions Judge of Saran, dated Aug. 9, 1909.

(1) (1908) 7 C. L. J. 373.

Lalji Gope v. Giridhari Chaudhury (1) referred to
In re Devji (2), *Akhil Chandra De v. Queen-Empress* (3), *Abdul Rahman v. Emperor* (4), and *Haibat Khan v. Emperor* (5) distinguished.

But if the informant, upon the police reporting the information to be false, subsequently petitions the Magistrate for a judicial inquiry, he must be taken to have preferred a complaint, and section 476 would then apply.

Queen-Empress v. Sham Lal (6), *Queen-Empress v. Sheikh Beari* (7), and *Jogendra Nath Mookerjee v. Emperor* (8) referred to.

No sanction should be granted, or prosecution directed, unless there is a reasonable probability of conviction, though the authority granting a sanction under section 195, or taking action under section 476, should not decide the question of guilt or innocence. Great care and caution are required before the Criminal law is set in motion, and there must be a reasonable foundation for the charge in respect of which a prosecution is sanctioned or directed.

Ishri Prasad v. Sham Lal (9), *Kali Charan Lal v. Basudeo Narain Singh* (10), and *Queen v. Daijoo Lal* (11) referred to.

Where there had been prolonged litigation between the petitioner and the opposite party, in which the former had been successful, so that the case was by no means improbable, and two Magistrates had, in the course of the judicial investigations preceding the trial, accepted the prosecution story as substantially true, and the Assessors had only found the case not proved :—

Held, that, under the circumstances, it was not a proper case for a prosecution under section 476 of the Code.

ON the 2nd May 1909 the petitioner lodged an information, under section 154 of the Criminal Procedure Code, at the Ekma police station, against Joynarain Roy and five others, of offences under sections 395 and 412 of the Penal Code, which the police reported to be false on the 9th of May. The petitioner then filed a petition before the Deputy Magistrate of Chapra, on the 11th, impugning the police report and praying for a judicial investigation, which was ordered, and was held by a subordinate Magistrate. The accused were then summoned and, after a preliminary investigation, committed to the Sessions. They were tried before Mr. H. Foster, Sessions Judge of Saran, and two Assessors, and acquitted on the 26th July. The Judge thereupon drew up a proceeding under section 476

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| (1) (1900) 5 C. W. N. 106. | (6) (1887) I. L. R. 14 Calc. 707. |
| (2) (1893) I. L. R. 18 Bom. 581. | (7) (1887) I. L. R. 10 Mad. 232. |
| (3) (1895) I. L. R. 22 Calc. 1004. | (8) (1905) I. L. R. 33 Calc. 1. |
| (4) (1907) 7 C. L. J. 371. | (9) (1885) I. L. R. 7 All. 871. |
| (5) (1905) I. L. R. 33 Calc. 30. | (10) (1907) 12 C. W. N. 3. |

- (11) (1876) I. L. R. 1 Calc. 450.

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of the Criminal Procedure Code, and called upon the petitioner to show cause why his prosecution, under section 211 of the Penal Code, should not be directed in respect of the false information to the police on the 2nd May and the complaint to the Magistrate on the 11th instant. Cause was shown, but the Judge directed the case to be sent to the District Magistrate of Saran for enquiry or trial.

Babu Dasharathi Sanyal and Babu Abanibhushan Mukerjee, for the petitioner.

Babu Manmatha Nath Mukerjee, for the Crown.

MOOKERJEE AND CHATTERJEE JJ. We are invited in this Rule to set aside an order made by the Sessions Judge of Saran under section 476 of the Criminal Procedure Code. The circumstances under which the order in question was made may be briefly narrated. On the 2nd May 1909, Jadu Nandan Singh, the petitioner before us, informed the police that Joy-narain Roy and five other persons had robbed him and committed offences punishable under sections 395 and 412 of the Indian Penal Code. The police reported the case to be false, whereupon the petitioner applied for a judicial enquiry into the matter. The accused were subsequently committed to take their trial in the Court of Sessions, but the Sessions Judge, in agreement with both the Assessors, found them not guilty and acquitted them. At the same time the Sessions Judge called upon the complainant to show cause why his prosecution should not be directed for an offence under section 211 of the Indian Penal Code, inasmuch as he had brought a false case against the accused. Cause was shown, but the Sessions Judge overruled all the objections and sent the case to the District Magistrate of Saran for enquiry and trial on the ground that the petitioner had lodged a false first information at the Ekma police station on the 2nd May 1909, and had caused to be recorded a false complaint before the Deputy Magistrate of Chapra on the 11th May 1909. The legality of this order has been called in question before us substantially on two

grounds : namely, *first*, that it was not competent to the Sessions Judge to make an order under section 476, inasmuch as the alleged offence had not been committed before a Court of Justice or brought to his notice in the course of a judicial proceeding ; and, *secondly*, that, upon the facts and circumstances of the case, the order should not have been made.

In support of the first ground, it has been urged by the learned vakil for the petitioner that section 476 has to be read with section 195, and that, as the alleged offence under section 211 of the Indian Penal Code has, if at all, been committed in the course of a police investigation, and not in relation to any proceeding in a Court, section 476 has no application. This position has been sought to be maintained by a reference to the decisions of this Court in the cases of *Abdul Rahman v. Emperor* (1) and *Dharmadas Kavar v. King-Emperor* (2). In answer to this contention, it has been argued by the learned vakil, who appears on behalf of the Crown, that section 476 refers to the offences mentioned in section 195, apart from the qualifications as to the place in which, or the person by whom, such offences may have been committed, and that in substance the restrictions mentioned in section 195 cannot be incorporated into section 476. In support of this view, reliance has been placed upon the cases of *In re Devji* (3) and *Akhil Chandra De v. Queen-Empress* (4). To determine which of these two contentions ought to prevail, it is necessary to examine closely the provisions of sections 195 and 476.

Clause (b) of section 195, in so far as it is applicable to the case before us, provides that no Court shall take cognizance of any offence punishable under section 211 of the Indian Penal Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction or on the complaint of such Court or of some other Court to which such Court is subordinate. It cannot be disputed that, in order to make this provision of the law applicable, the false statement must have been made in a Court or in relation to any

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(1) (1907) 7 C. L. J. 371.

(2) (1908) 7 C. L. J. 373.

(3) (1893) I. L. R. 18 Bom. 581.

(4) (1895) I. L. R. 22 Calc. 1004.

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proceeding in a Court, and that no sanction is consequently necessary when false evidence is alleged to have been fabricated during a police investigation; in other words, no sanction is required to prosecute a person for having instituted a false charge before the police: *Jagat Chandra Mozumdar v. Queen-Empress* (1), *Putiram Ruidas v. Mahomed Kasem* (2), *Ramasami v. Queen-Empress* (3). The position, therefore, so far as section 195 is concerned, is beyond dispute. Let us now turn to section 476. That section—we quote only so much of it as applies to the present case—provides that, when any Criminal Court is of opinion that there is ground for enquiring into any offence referred to in section 195 and committed before it, or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary enquiry that may be necessary, may send the case for enquiry or trial to the nearest Magistrate of the first class. The whole question turns upon the effect to be attributed to the words “any offence referred to in section 195.” Do these words mean, as contended on behalf of the Crown, the offences covered by the sections of the Indian Penal Code mentioned in section 195, or do they mean, as contended on behalf of the petitioners, the offences mentioned in those sections and committed under the qualifying circumstances described in section 195? The cases of *In re Devji* (4) and *Akhil Chandra De v. Queen-Empress* (5) seem to support the view that the qualifying circumstances mentioned in section 195 are not to be treated as incorporated into section 476. It is worthy of note, however, that both these cases turn upon section 478 read with clause (c) of section 195, and may, to this extent, be regarded as not directly in point. It is further to be remarked that the learned Judges who decided those cases ruled that the offence of forgery gave the Court jurisdiction to proceed under section 478, whether it had been committed by a party to the proceeding or by a witness, or whether it had been committed in respect of

(1) (1899) I. L. R. 26 Calc. 786.

(3) (1884) I. L. R. 7 Mad. 292.

(2) (1895) 3 C. W. N. 33.

(4) (1893) I. L. R. 18 Bom. 581.

(5) (1895) I. L. R. 22 Calc. 1004.

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a document merely produced, but not given in evidence. It has been suggested before us that there may be a distinction, possibly somewhat subtle, but nevertheless quite appreciable, between the element of person by whom an alleged offence is committed or subject matter in respect of which the commission of the offence is charged, as in the cases to which reference has been made, and the element of place where the offence is committed as in the case before us. We observe, further, that judicial opinion is by no means uniform, even so far as the point directly raised in these two cases is concerned, for in *Abdul Khadar v. Meera Saheb* (1) it was ruled by the learned Judges of the Madras High Court that when an offence is alleged to have been committed under section 471 of the Indian Penal Code, section 478 of the Criminal Procedure Code ought to be read with the qualifications mentioned in section 195, clause (c), so as to make section 476 inapplicable if the alleged offence has been committed in respect of a document not given in evidence. On the other hand, so far as sections 476 and 195, clause (b), are concerned, we have the case of *Dharmadas Kawar v. King-Emperor* (2), which is directly in point. In that case, a false information was given to the police in regard to the death of a girl. The informant was directed to be prosecuted under section 211 of the Indian Penal Code. This order, made under section 476, was questioned, on the ground that the alleged offence had not been committed in, or in relation to, any proceeding in any Court. The objection prevailed, and the learned Judges held that, as the offence, if any, was committed before the police and not before any Court, or in the course of any judicial proceeding or of any proceeding in any Court, the Sessions Judge had no jurisdiction to make an order under section 476. The same view appears to be supported by the observations of this Court in *Lalji Gope v. Giridhari Chaudhury* (3), where the order under section 476 was maintained, not on the ground that a false report had been made to the police, but on the ground that subsequently

(1) (1892) I. L. R. 15 Mad. 224.

(2) (1908) 7 C. L. J. 373.

(3) (1900) 5 C. W. N. 106.

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the informant had lodged a false complaint before the Magistrate who investigated the matter on receipt of the police report. We may add that the case of *Abdul Rahman v. Emperor* (1), as well as the decision in *Huibat Khan v. Emperor* (2), upon which it is based, are distinguishable. These decisions appear to have proceeded on the ground that a Magistrate who has made over a case to another Magistrate for judicial enquiry cannot himself direct a prosecution under section 476 in respect of an alleged false information given to the police, because the matter did not come to his cognisance in the course of a judicial proceeding. The result of the authorities, therefore, is that, upon the question of the effect of clause (c) of section 195 upon section 478, judicial opinion is divided; but upon the question of the effect of clause (b) of section 195 upon section 476, we have recent decisions of this Court in favour of the view that the qualification mentioned in the former section is to be treated as incorporated in the latter provision. Upon the arguments which have been addressed to us, we are not prepared, as at present advised, to dissent from this view. We must, therefore, uphold the contention of the petitioner that it was not competent to the learned Sessions Judge to make an order under section 476 in respect of the alleged false information lodged at the Ekma police station on the 2nd May 1909. In respect, however, of the second part of the order, which relates to the alleged false complaint made before the Deputy Magistrate of Chapra on the 11th May, the position is entirely different. It is clear that when the police reported the complaint to be false, the petitioner insisted upon a judicial investigation, and he must consequently be taken to have preferred a complaint to the Magistrate. It is sufficient, in support of this view, to refer to the cases of *Queen-Empress v. Sham Lall* (3), *Queen-Empress v. Sheik Beari* (4), and *Jogendra Nath Mookerjee v. Emperor* (5). The second part of the order, therefore, cannot be treated as made without jurisdiction.

(1) (1907) 7 C. L. J. 371.

(3) (1887) I. L. R. 14 Cal. 707.

(2) (1905) I. L. R. 33 Cal. 30.

(4) (1887) I. L. R. 10 Mad. 232.

(5) (1905) I. L. R. 33 Cal. 1.

This renders necessary an examination of the second ground upon which the propriety of the order is challenged.

In respect of the second ground, it has been urged that, upon the circumstances as disclosed in the evidence adduced before the Court of Sessions, the case is at best doubtful, and proceedings ought not to have been commenced under section 476 of the Criminal Procedure Code. In our opinion there is considerable force in this contention. The learned Sessions Judge has discredited the entire prosecution case on the ground that the complainant could not possibly have been present at the place of the alleged robbery, and the incident is so improbable that it must be treated as mythical. We are unable to accept this view of the case. There can be no question that there had been prolonged litigation between the complainant and the party represented by the accused in the Criminal, Revenue and Civil Courts, and that the complainant had ultimately succeeded in his endeavour to recover and retain possession of the property in which the accused and their masters were interested. The subsequent incident, which is the foundation of the present complaint, is, in our opinion, by no means improbable. We must further bear in mind that in the course of the judicial investigations which preceded the trial, two Magistrates had found that a *prima facie* case had been made out and accepted the prosecution story as substantially true. The Assessors also, who found the accused not guilty, merely came to the conclusion that the case was not proved. Under these circumstances, we are unable to hold that this is a proper case in which proceedings ought to be commenced under section 476 of the Criminal Procedure Code. The principle which should guide Courts in taking action under section 195 or 476 is now well settled. No sanction should be granted unless there is a reasonable probability of conviction. It would be an abuse of the powers vested in a Court of Justice if sanction were given or upheld on the principle that, though the conviction of the party complained against is a mere possibility, it is desirable that the matter should be threshed out, so that it may be decided whether or not an offence has been committed.

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No doubt the authority which is called upon to grant a sanction under section 195, or to take action under section 476, need not, and should not, decide the question of guilt or innocence of the party against whom proceedings are to be instituted ; but great care and caution are required before the Criminal law is set in motion, and there must be a reasonable foundation for the charge in respect of which prosecution is sanctioned or directed. It is sufficient, in support of this view, to refer to the cases of *Ishri Prasad v. Sham Lal* (1), *Kali Charan Lal v. Basudeo Narain Singh* (2), *Queen v. Baijoo Lall* (3). Upon an examination of the circumstances of the case before us, we are satisfied that sufficient grounds have not been made out to justify the initiation of any proceeding under section 476 of the Criminal Procedure Code. The result, therefore, is that the Rule must be made absolute, and the order of the Court below discharged.

Rule absolute.

E. H. M.

(1) (1885) I. L. R. 7 All. 871.

(2) (1907) 12 C. W. N. 3.

(3) (1876) I. L. R. 1 Calc. 450.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Woodroffe.*

PADMABATI DASÍ

v.

RASIK LAL DHAR.*

1909
Nov. 30 :
Dec 21.

*Affidavit—Practice—Grounds of belief—Civil Procedure Code (Act V of 1908),
Order XIX, rule 3—Jurisdiction—Rehearing.*

The provisions of Order XIX, rule 3 of the Code of Civil Procedure, must be strictly observed: every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity.

The Court has inherent jurisdiction to rehear a matter before the order passed by the Court at a previous hearing has been perfected.

APPLICATION.

On the 4th September 1905, two Hindu ladies, Sreemati Padmabati Dasi and Sreemati Rajnandini Dasi, instituted a suit as heiresses of their deceased mother, Sreemati Annapurna Dasi, for the recovery of certain properties belonging to their mother, from their uncle, the defendant Rasik Lal Dhar. On the 21st May 1909, a decree was passed by Harington J. ordering the defendant to deliver up certain articles of furniture to the plaintiffs, and otherwise dismissing the suit with costs. This decree was filed on the 17th August 1909.

On the 18th August 1909 the plaintiffs filed a memorandum of appeal, and thereupon took certain steps in prosecution of the appeal. On the 15th November 1909 the appellants obtained an order from Harington J. allowing them three weeks' further time from date to file their paper-book, with liberty to apply for further extension of time to the Appeal Court, which would be in Session on the expiration of the three weeks.

The Court of Appeal commenced its Session on the 24th November 1909. On the 30th November 1909 Rasik Lal Dhar

* Application in appeal, from Original Civil, No. 40 of 1909.

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applied on petition to the Court of Appeal for an order that the appellants may be directed to furnish security for the costs incurred by the respondent in the Court of first instance and on appeal. It was alleged in the petition, *inter alia*, that the appellants were *purdanashin* ladies having no *stridhan* property of their own, that the respondent's costs in the Court of first instance amounted to Rs. 8,000, and that the appellants had been dilatory in their prosecution of the appeal, and were trying to delay the hearing thereof.

The allegations in the petition were verified by the respondent in the following terms: "I, Rasik Lal Dhar, the defendant-respondent above-named, solemnly affirm and say that what is stated in the foregoing petition is true to the best of my knowledge, information and belief."

There was an affidavit in reply made by one Kunja Lal Dey, the husband of Sreemati Padmabati Dasi, to the effect, *inter alia*, that he was conducting the suit on behalf of the appellants, that the appellants were possessed of *stridhan* properties of the value of Rs. 10,000 and Rs. 8,000 respectively, and that the appellants had done their best to expedite the hearing of the appeal.

Mr. C. C. Ghose, for the respondent.

Mr. H. D. Bose, for the appellants.

Their Lordships dismissed the application, observing as follows:—

JENKINS C.J. AND WOODROFFE J. We think in this case no sufficient ground is shown for an order for security. All we have on which to act is an allegation of the appellants' lack of means followed by a general averment that the statements are to the best of the deponent's knowledge, information and belief; but what his information and belief are, or on what his belief is grounded, is in no way indicated. Order XIX, rule 3, however, declares that "affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of

his belief may be admitted, provided that the grounds thereof are stated." That proviso is essential, but no attempt has been made to comply with its terms.

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We desire to impress on those who propose to rely on affidavits that, in future, the provisions of Order XIX, rule 3, must be strictly observed, and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief.

The applicant must pay the costs of this application.

The three weeks' time allowed by Harington J. having expired on the 6th December 1909, the appellants applied to the Court of Appeal for further time to file their paper-book. It was opposed by the respondent, on the ground, *inter alia*, that there had been unnecessary delay in furnishing the necessary stamp. By an order dated the 7th December the Court refused the application in the following terms :—

JENKINS C.J. AND WOODROFFE J. In our opinion there has been a delay in excess of what can be reasonably accounted for, and in respect of two periods of time. Having regard to that and to all the circumstances, we are not prepared to extend the time further. We refuse the application for extension of time with costs.

Thereupon, the respondent gave the appellants notice of an application for the dismissal of the appeal for want of prosecution. The appellants, *contra*, gave the respondent notice of an application for the rehearing of their application for further extension of time. The order of the 7th December 1909 had not been drawn up. It was alleged by the appellants in their petition that the reason for the delay in obtaining the necessary stamps, which had not been explained to the Court of Appeal on the 6th December, had in fact been laid before Harington J. on the 15th November, and been accepted by him.

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The appellants' application was heard on the 21st December 1909.

Mr. Hill (with him *Mr. H. D. Bose*), for the appellants. The order of the 7th December has not been drawn up. The Court has power to rehear the application for extension of time. In this country there is no specific rule giving the Court jurisdiction to rehear a matter before the order is drawn up.

Mr. C. C. Ghose, for the respondent. This is, in effect, an appeal from your Lordships' order of the 7th December 1909.

[JENKINS C.J. I think we have the power and we will hear the application on its merits.]

After hearing the application their Lordships made the following order :—

JENKINS C.J. AND WOODROFFE J. We give you three weeks' time from to-day. You are to give security for the costs of the appeal to the extent of Rs. 2,500 to the satisfaction of the Registrar within one week from the re-opening of the Court after the Christmas vacation. Costs of the application to be costs in the appeal.

Application allowed

Attorneys for the appellants : *O. C. Ganguly & Co.*

Attorney for the respondent : *S. S. Banerji.*

J. C.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Vincent.

KHAJEH SALIMULLAH

v.

ABUL KHAIR M. MUSTAFA.*

1909
Aug 30.

Mahomedan Law—Endowment—Waqf—Direction of Founder, Court's power to disregard—Mutawalli, suit for the office of—Surrender of the office of Mutawalli and appointment of a successor by a person who is not a general trustee, effect of—Limitation Act (XV of 1877) Sch. II, Art. 120.

In appointing a *mutawalli* a Court will not disregard the directions of the founder except for the manifest benefit of the endowment.

In re Tempest (1) referred to.

A created a *waqf* on the 22nd April 1864; by the *waqf-namah* he appointed himself the first *mutawalli*, and also gave directions as to the appointment of his successors. The deed further provided that after the death of the founder his widow would remain in possession of the endowed properties, and the *mutawalli* would act under her orders. During the lifetime of the founder, the person who was nominated as the successor in the office of *mutawalli* died; subsequently, on the founder's death in 1868, his widow obtained certificate and undertook the performance of the duties of *mutawalli*, and continued to do so till the 29th of January 1877, when she executed a *towliatnamah*, by virtue of which she surrendered the office of *mutawalli*, and appointed a third party as her successor in that office, who accordingly took possession of the endowed properties.

Upon a suit by the plaintiff as one of the representatives of the founder for declaration of his right as *mutawalli* and for recovery of possession of the endowed properties:

Held, that, inasmuch as the widow of the founder was in no sense a general trustee, and that she had no authority, express or implied, to modify in any way the terms of the trust-deed, nor she had the authority to renounce the office and appoint a successor, her acts were illegal under the Mahomedan Law, and that Art. 120 of Sch. II of the Limitation Act applied to the case, and the plaintiff's suit was barred by limitation.

APPEAL by the defendants, Nawab Khajeh Salimullah Bahadur and another.

* Appeal from Original Decree, No. 389 of 1907, against the decree of Surendra Nath Mitter, Subordinate Judge of Dacca, dated June 27, 1907.

(1) (1866) L. R. 1. Ch. App. 485; 14 L. T. 685.

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This appeal arose out of an action brought by the plaintiff for a declaration that he was entitled to be the *mutawalli* of the *wagf* properties in suit, and for recovery of possession of the same from defendant No. 1. The plaintiff alleged that one Ayinuddin Hyder and Mainuddin were two brothers; that Mainuddin had two sons, Nasiruddin Hyder and Mazeruddin; that he was the son of Nasiruddin, defendants Nos. 3 and 4 were his sisters, and defendant No. 2 was the son of Mazeruddin; that Ayinuddin Hyder executed a *wagf* deed on the 11th Baisakh 1271 B.S. (22nd April 1864) of certain immoveable properties, by virtue of which he appointed himself the *mutawalli* of the *wagf* properties during his lifetime, and also nominated defendant No. 5 and another person to be the naib *mutawallis* during his lifetime; the deed further provided that after the death of the founder his nephew, Nasiruddin, would be the chief *mutawalli*, and he was authorised to nominate his successors from amongst his brothers' sons or from outsiders; and that the said *mutawalli* would manage the *wagf* properties under the directions of the founder's widow, Faizunnessa Bibi. It appeared that the plaintiff's father, Nasiruddin, died within the lifetime of Ayinuddin, and Ayinuddin died subsequently on 25th May 1868 without appointing any *mutawalli* to succeed him. Faizunnessa Bibi thereupon took letters of administration of the *wagf* estate, and remained in possession of the properties till the 29th of January 1877, when she executed a *towliatnamah* of certain immoveable properties, including the said *wagf* properties, by which deed she appointed the late Nawab Ahsanullah a *mutawalli*, and empowered him to nominate his successor. The Nawab managed the properties up to 16th December 1901, when he died without nominating his successor. The defendant No. 1, Nawab Salimullah, on the death of his father, the late Nawab, took possession of the endowed properties. Hence the suit was brought by the plaintiff on the allegation that under the Mahomedan law and by virtue of the two aforesaid deeds he, being the near relative of Faizunnessa Bibi, was entitled to be the *mutawalli* and to recover possession of the *wagf* properties.

The first defendant, and the fifth defendant, the naib *mutawalli* who contested the suit, pleaded, *inter alia*, that the plaintiff had no cause of action; that he alone was not entitled to maintain the suit; that he was not the heir or near relative of Faizunnessa; that he had no right to be appointed *mutawalli* under the *wagf* and *towliatnamah* deeds and under the Mahomedan Law; that there being a direct prohibition of the appointment of the plaintiff as the *mutawalli* in the *towliatnamah*, he was not entitled to be so appointed; that the father of the defendant No. 1 being in adverse possession of the properties, and after his death defendant No. 1 himself being in adverse possession of the same, plaintiff's suit was barred by limitation.

The Court of first instance overruled the objections of the defendants, and decreed the plaintiffs' suit.

Against this decision defendants Nos. 1 and 5 appealed to the High Court.

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Babu Surendra Nath Guha, for the appellants.

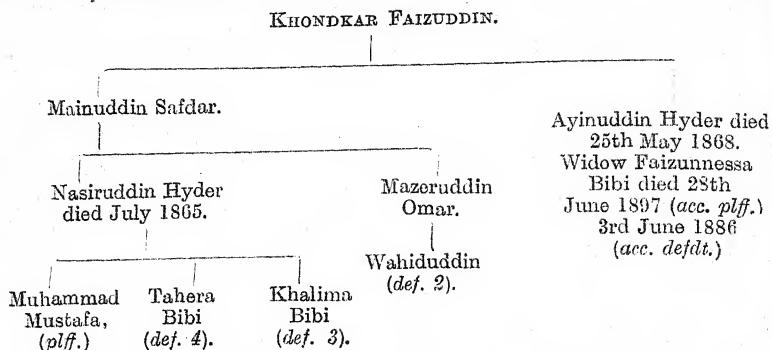
Moulvie Shamsul Huda, *Babu Ram Chandra Majumdar* and *Babu Karunamoy Bose*, for the respondent.

Cur. adv. vult.

MOOKERJEE AND VINCENT JJ. The subject-matter of the litigation, which has culminated in this appeal, consists of immoveable properties comprised in two *wagfs*, one created by Ayinuddin Hyder on the 22nd April 1864, and the other by his widow, Faizunnessa Bibi on the 29th January 1877. The plaintiff, who is a relation of the founders of the two *wagfs*, seeks for declaration of his right as *mutawalli* and for recovery of possession of the properties of the endowments. The first defendant is the Nawab of Dacca and is now in possession of the properties as the *mutawalli* under the deed of Faizunnessa executed on the 29th January 1877. The second defendant is a cousin of the plaintiff, who had previously failed in a litigation commenced by him on the 14th August 1880 for recovery of possession of the *wagf* properties as *mutawalli*. The third and fourth defendants are sisters of the plaintiff and have been brought on the record as members of the family interested in

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the endowment. Their relation to the founder is indicated in the following genealogical table :



The fifth defendant is the *naib mutawalli* or the Deputy Superintendent of the endowment. The remaining defendants, fourteen in number, are members of the family of the Nawab of Dacca. The suit was defended substantially by the first defendant, the Nawab, and by the fifth defendant, the Deputy Superintendent of the *wagf*. They denied the title of the plaintiff to hold the office of *mutawalli* in respect of either of the two *wagfs*, and raised the plea that the claim, even if otherwise well-founded, was barred by limitation. A question appears also to have been raised as to the validity of the *wagfs* under the Mahomedan Law. This, however, has not been investigated, for the obviously sufficient reason that, as both parties lay claim to the office of *mutawalli*, the question of the legality of the *wagf* cannot properly arise. The Subordinate Judge in the Court of first instance has overruled the objection of the contesting defendants, and has held that the Nawab of Dacca has no valid title to the office of *mutawalli* under the deed of Faizunnessa, while the plaintiff is entitled to hold the office as one of the representatives of the founders of the two endowments. He has further held that as the suit has been commenced within 12 years of the death of Faizunnessa in 1897, as alleged by the plaintiff, the claim is not barred by limitation. In this view he has made a decree in favour of the plaintiff, by which the latter is appointed the chief *mutawalli* of all the disputed properties except one, and is authorised

to recover possession of the *waqf* properties from the first defendant. The first and fifth defendants have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed substantially on two grounds, namely, *first*, that as regards the *waqf* created by Faizunnessa on the 29th January 1877, the plaintiff is not entitled to hold the office of *mutawalli* and recover possession of the disputed properties, in view of the clear directions to the contrary given by the founder herself; *secondly*, that so far as the *waqf* created by Ayinuddin Hyder on the 22nd April 1864 is concerned, the title, if any, of the plaintiff to hold the office of *mutawalli* has been extinguished by the adverse possession of that office by Nawab Ahsanullah and Nawab Salimullah during more than 28 years from the 29th January 1877 to the date of the institution of the suit. Both these points have been controverted on behalf of the plaintiff-respondent.

In support of the first ground urged on behalf of the appellants, our attention has been invited to the deed of *waqf*, called the *towliatnamah* executed by Faizunnessa Bibi on the 29th January 1877. This deed has a two fold character. It deals with the properties dedicated as *waqf* by Ayinuddin Hyder on the 22nd April 1864; this aspect of it will require consideration when we come to deal with the second ground. But it also creates a new *waqf* for the purposes of which the founder dedicates her own properties. She appointed Nawab Ahsanullah as the *mutawalli* in respect of both the *waqfs*, and then added the following clause with regard to her husband's brother's grandsons, the present plaintiff and the second defendant:

"Though Muhammad Mustafa and Wahiuddin, the sons of my deceased husband's brother's sons are living, they denied the validity of the *waqfnamah*, and intending to divide the *waqf* properties among themselves as by right of inheritance, they entered into various litigations with me for seven or eight years in Civil, Criminal and Revenue Courts, in which they were unsuccessful up to the High Court. Besides, they are indebted to the amount of seven or eight thousand rupees. In effect, they are but irreligious people, because, although they are not entitled in

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any way to the *waqf* properties, they brought these suits to gain unlawful possession. In these circumstances they ought not in any way to be made *mutawallis*." In a later passage in the same deed, the founder repeated her objection to these persons and directed that "though Nawab Ahsanullah might, when old, appoint a fit and proper person as a successor in the office, Muhammad Mustafa and Wahiuddin who had committed waste were not to be appointed." It is manifest from those provisions in the *towliatnamah* that the founder deliberately directed that the present plaintiff was not on any account to hold the office of *mutawalli* of the *waqf* created by her. Under these circumstances, even if we assume that the Court has the authority to disregard the clearly expressed wishes of the founder, the question necessarily arises whether the plaintiff should be appointed *mutawalli* of the *waqf* of 1877. In our opinion only one answer is admissible. The Court will not, even if we assume that it has the power to do so, disregard the directions of the founder except for the manifest benefit of the endowment. The principles applicable to cases of this description are well-settled and were explained by Lord Justice Turner in *In re Tempest* (1); one of these principles is that the Court in selecting a person for the office of trustee will, in the exercise of its judicial discretion, have regard to the wishes of the author of the trust expressed in or plainly deduced from the instrument, and if he has declared a particular person not fit to be appointed a trustee, the Court will refrain from appointing him. To what extent regard is paid to the wishes of the founder may be illustrated by the following texts translated from two works of high authority on Mahomedan Jurisprudence :

TEXT I.

اسعاف مفقده ٨٩

شروط في عقدة وقفه - ان من انتقل منهم من الاثبات - رمدار
 الى مذهب الاعتزال - فهو خارج - صم الوقف - ويخرج منه
 بخروجه *

(1) (1866) L. R. 1 Ch. App. 485; 14 L. T. 685.

ولو كان الواقف من المعتزلة - و شرط عكس هذا الشرط -

عمل بشرطه *

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If the founder of the *waqf* stipulates in the deed of *waqf* that such of his descendants as becomes converted from the sect of *Ithbat* into that of *I'tizal* will be excluded (that is, from participation in the benefit of the *waqf*), the *waqf* is valid and they are excluded on their conversion. If, on the other hand, the founder is a *mu'tazilah* (that is a follower of the sect of *I'tizal*) and stipulates the opposite of the stipulation stated above, his stipulation is acted upon (Is'af of al-Tarabulusi, A.D. 1516, Cairo Edition, page 89).

TEXT II.

الاشياء والنظائر صفحه ٣٠٨

شرط الواقف يجب اتباعه - لقولهم شرط الواقف كذا الشارع -
اى في وجوب العمل به و فى المفهوم و الدلالة - كما بيذا في شرح -
الكنز - الا في مسائل *

الاولى شرط ان القاضي لا يعزل الناظر - فله عزل غير الاهل *
الثانية شرط ان لا يوجروقه اكثر من سنة - و الناس لا يرغبون في
استيجاره سنة - او كان فى الزيادة نفع للفقراء - فللقاضي المخالفة
دون الناظر *

الثالثة لو شرط ان يقرأ على قبره فالتعيين باطل *
الرابعة شرط ان يتصدق بفاضل الغلة على من يسأل في مسجد
كذا كل يوم - لم يراع شرطه - فللقديم التصدق على سائلي غير ذلك
المسجد او خارج المسجد - او على من لا يسأل *
الخامسة لو شرط للمستحقين خبزاً و لحماً معيناً كل يوم - فللقديم ان
يدفع القيمة من النقد - و في موضع آخر لهم طلب العين و اخذ
القيمة *

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السادسة تجوز الزيادة من القاضي على معلوم الامام اذا كان

لا يكتفيه *

السابعة شرط الواقف عدم الاستبدال - فللقاضي الاستبدال اذا

كان اصلح *

Any condition imposed by the founder of the *wagf* must be respected, because of the dictum of the jurists, "any condition imposed by the founder of the *wagf*, is like an express text of the law-giver," that is, with respect to the bindingness to act upon it, and the implication and indication as we have described in the commentary on the *Kanz*, except in a few cases, namely,

(1) Where the founder stipulates that the *mutawalli* cannot be removed by the *Cadi*, the *Cadi* can remove one unfit for the office.

(2) Where he stipulates that the *wagf* property should not be leased for more than a year, and people are unwilling to lease it for a year, or there is advantage to the poor in giving a longer lease, the *Cadi* (but not the *mutawalli*) can disregard the stipulation.

(3) Where it stipulates that the Koran should be recited at his grave, the restriction as to the place is void.

(4) Where he stipulates that the surplus of the revenue should be given in charity to any one asking for it at such and such a place daily, no regard will be had to his stipulation. The *mutawalli* can give it in charity to those who ask for it at a mosque other than that mosque or to those outside that mosque or to those who do not ask for it.

(5) Where he stipulates that the beneficiaries should daily get a fixed quantity of bread and meat, the *mutawalli* can pay them the price (of that quantity of bread and meat).

(6) Where the founder has fixed an amount for the salary of the *Imam*, the *Cadi* can increase it where it is insufficient.

(7) Where the *wagf* has prohibited *istibdal*, i.e., exchange of *wagf* property for another property, the *Cadi* can have

recourse to *istibdal* when it is more beneficial. [Al-Ashbah wa'l-Naza'ir, Analogies and Precedents by the celebrated Egyptian jurist, Ibn Nujaym, author of Bahr-al-ra'iq, A.D. 1562. This passage is referred to in the Durr al-Mukhtar, Constantinople Edition, Volume III, page 601, and is quoted *in extenso* by the Raddal-Muhtar, Constantinople Edition, Volume III, page 601.]

Tested in the light of the principle recognised in these texts, it is clear that the plaintiff cannot succeed. In the case before us, there is no possible room for doubt as to the wishes of the founder in this respect. We must, therefore, uphold the contention of the appellants that the plaintiff-respondent ought not to be appointed to hold the office of the *mutawalli* of the *waqf* created by Faizunnessa Bibi in 1877. The first ground taken on behalf of the appellants must consequently prevail.

In support of the second ground taken on behalf of the appellants, our attention has been invited to the course of dealing of the *waqf* created by Ayinuddin Hyder in 1864. The *waqf-namah* shows that the founder appointed himself the first *mutawalli*, and also gave directions for the appointment of his successors. The three passages which bear upon this point are as follows :

(a) "So long as I am living, I myself shall be *mutawalli* of the same, and I appoint Moulvi Nasiruddin Hyder, my brother's son, as the principal *mutawalli*, and Munshi Ahmedullah and Moulvi Bux Ali as the *na'ib mutawalli* to act after me."

(b) "The said *mutawalli* (that is Nasiruddin Hyder) in his old age shall be at liberty to appoint according to his own choice any of his own children, or any of the children of his brother, or any person whom he considers competent and capable to discharge the *mutawalli* duties, as *mutawalli* in his own place."

(c) "I shall remain the *mutawalli* and also the possession and enjoyment of the endowed properties as *waqf* properties shall rest with me, and after that with my wife, Mussamat

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Faizunnessa Bibi, and under her orders with the principal *mutawalli* aforesaid and the naib *mutawalli* above named."

The actual contingency, however, which happened was not anticipated and provided for by the founder. His nephew, Nasiruddin Hyder, whom he had nominated as his successor in the office of *mutawalli*, died in 1865. Clauses (a) and (b) set out above therefore never came into operation, and although Ayinuddin lived for three years longer, he did not in this respect alter or supplement the terms of the original *wagfnamah*. The consequence was that upon his death in 1868 his widow, Faizunnessa, obtained certificate and undertook the performance of the duties of *mutawalli* of the *wagf* created by her husband. She continued to do so up to the 29th January 1877, when she executed the *towliatnamah* to which reference has previously been made. In so far as this deed purports to create a new *wagf* of her personal properties, we have already considered its effect. We have now to examine its legal consequences in so far as it modifies the terms of the *wagfnamah* of 1864 by Ayinuddin Hyder. We are not concerned in this litigation with the validity of the modifications sought to be introduced by Faizunnessa in the mode of administration of her husband's *wagf*. We are concerned solely with the effect of her surrender of the office of *mutawalli*, of the appointment by her of Nawab Ahsanullah as her successor in that office, and of the directions given by her for the appointment of the successor of the Nawab himself. In the introductory portion of the deed, she recites that the death of Naziruddin in the lifetime of her husband had rendered inoperative his proposed appointment as *mutawalli*, that her husband to the time of his death acted as *mutawalli*, and that since his death she herself had discharged the duties of that office. She then proceeded to appoint voluntarily Nawab Ahsanullah as the *mutawalli* and also to confirm the appointments of the naib *mutawallis*. The deed contemplated that the Nawab should take immediate possession of the office and of the properties appertaining thereto. We now know from Exhibit 3 that the Nawab did so and got himself registered as the *mutawalli* on the 14th April 1877.

Paragraph 23 of the deed finally provided that, when he reached old age, he would be entitled of his own choice to appoint a suitable person as *mutawalli*, but that Mahomed Mustafa and Wahiduddin were not to be appointed on any account. The deed further provided that, in the event of failure on the part of Nawab Ahsanullah to appoint his successor, the person who would take his place (in the family) would become as the *mutawalli* of the *wagf* properties. The Nawab, as we have already stated, entered upon the execution of the duties of his office as a *mutawalli* and administered the *wagf* properties from 1877 to the time of his death on the 16th December 1901. During this period he successfully resisted the suit brought by Wahiduddin in 1880 for recovery of possession of the *wagf* properties. That suit was dismissed by the Subordinate Judge, whose judgment was confirmed on appeal by the District Judge, and ultimately by this Court in 1883. Upon the death of Nawab Ahsanullah in 1901, his son, Nawab Salimullah, took possession of the *wagf* properties as *mutawalli*, and the plaintiff now seeks to eject him on the ground that he is a trespasser, and has no right to hold the office as against the plaintiff, who, as a member of the family of the founder, has a prior claim to the office. The substantial question in controversy is whether the title of the plaintiff to the office, if any, has not been extinguished by limitation.

We may assume, for the purposes of the present discussion, that although Faizunnessa was not expressly appointed as *mutawalli*, the *wagfnamah* of 1864 clearly intended to give her the same right of superintendence after the death of her husband as the latter had retained during his lifetime. We assume, therefore, that Faizunnessa lawfully took possession of the *wagf* properties as *mutawalli* after the death of her husband in 1868. There is nothing in the deed of endowment, however, which could authorise her to appoint a successor or to vacate the office in favour of another person of her choice. What, then, was the effect of her *towliatnamah* of the 29th January 1877? An examination of the following texts, translated from works of recognised authority on Mahomedan Law, tends

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to show that her act in both these respects was entirely unauthorised, sanctioned neither by Mahomedan Law nor by the terms of the original endowment :

TEXT III.

فتاوى قاضىخان حلد رابع

[صفحہ ۲۱۶]

وقف صحيح على مسجد بعينه وله قديم فمات القيم فاجتمع اهل المسجد وجعلوا رجلاً متولياً بغير امر القاضي - فقام هذا المتولي بعمارة المسجد من غلات وقف المسجد - اختلف المشائخ رح في هذه القولية - و الاصح انها لا تصح - ويكون نصب القيم الى القاضي *

"A man in good health made *waqf* for the benefit of a particular mosque having a *mutawalli*. The *mutawalli* died after this, and the people who frequented the mosque assembled and appointed a man as *mutawalli* with the sanction of the *Cadi*. This *mutawalli* applied himself to the repairs of the mosque out of the income of the *waqf* of the mosque. The jurists differ as to such an appointment of a *mutawalli*; the most correct view is that such an appointment is not valid. The power of making the appointment of a *mutawalli* belongs to the *Cadi* [Fatawa Qadi Khan, A. D. 1196, Calcutta Edition, 1835, Volume 4, page 216].

TEXT IV.

[ايضاً صفحہ ۲۱۹]

متولي الوقف اذا مرض مرض الموت وفوض امر الوقف الى غيره جاز - لان المتولي بمنزلة الوصي وللوصي ان يوصي الى غيره *

If the *mutawalli* of a *waqf* suffering from illness which culminates in death delegates the affairs of the *waqf* to another person, it is valid, because the *mutawalli* is in the position of an executor, and the executor has the power of appointing another as his executor [Fatawa Qadi Khan, Volume 4, page 219].

TEXT V.

كتاب الاسعاف

[صفحه ٤٢]

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فان مات ولم يجعل ولايته الى أحد - جعل القاضي له قايما
ولا يجعله من الاجانب ما دام يجد من أهل بيت الواقف من يصلح
لذلك - اما لانه اشفق - او لان من قصد الوقف نسبة الوقف اليه -
وذلك فيما ذكرنا - فان لم يجد فمن الاجانب من يصلح - فان اقام
أجنبيا - ثم صار من ولده من يصلح - صرفه اليه - كما في حقيقة
الملك *

If the appropriator dies without appointing a *mutawalli*, the *Cadi* should appoint the *mutawalli*. But he should not appoint a stranger so long as a fit and proper person can be found from amongst the members of the founder's family, either because the latter would be more attached (to the *waqf*) or because the intention of the founder might have been that the *waqf* should be associated with him. If no one from amongst the founder's family could be found, (the *Cadi* should appoint) a stranger who is a fit and proper person for the post. If, after the appointment of the stranger, some one from amongst the descendants of the appropriator is found to be qualified for the appointment, the *mutawalliship* should revert to him just as in the case of succession (*Is'af* by al-Tarabulusi, A.D. 1516, Cairo Edition, page 42).

TEXT VI.

عالمگیری جلد ثانی

[صفحه ٥٧]

اذا مات المتولي و الواقف حي - فالرأي في نصب قيم آخر
الى الواقف لا الى القاضي - و ان كان الواقف ميئا فوصيه اولى من
القاضي - فان لم يكن اوصى الى احد - فالرأي في ذلك الى
القاضي - كذا في الفتاوى الصغرى *

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و فى الأصل - الحاكم لا يجعل القيم من الأجانب ما دام من اهل
 بيت الواقف من يصلح لذلك - وان لم يجد منهم من يصلح
 ونصب غيرهم - ثم وجد منهم من يصلح صرفه عنه الى اهل بيت
 الواقف - كذا فى الوجيز *

If the *mutawalli* dies and the appropriator survives him, the power of appointing another *mutawalli* belongs to him and not to the *Cadi*. But if the appropriator does not survive him, then the executor of the founder shall have preference over the *Cadi*. But if the founder has not left any executor, then the power belongs to the *Cadi*. Thus it is laid down in *Fatawá Sughrāh*. In the *Asl* (of Imam Muhammad) it is laid down that the *hakim* should not appoint a stranger as *mutawalli* so long as there could be found amongst the members of the appropriators' family any person fit for the same. If no one qualified could be found amongst them, and a stranger is appointed *mutawalli*, and then afterwards some one amongst them is found to be qualified, the *mutawalliship* shall revert from him (the stranger) to the member of the founder's family. Thus it is laid down in the *Wajiz* (*Fatawá 'Alamgiri*, Calcutta Edition, Volume II, page 507).

TEXT VII.

فتاوى مہدیہ جلد ثانی

[صفحہ ۵۷۵]

فى القنية - ولو قال المتولي من جهة الواقف - غزلت نفسي -
 لا ينعزل - الا ان يقول له او للقاضي - فيخرجه *

فتاوى عالمگیری جلد ثانی

[صفحہ ۵۰۹ سطر ۶]

ولو قال متول من جهة الواقف - غزلت نفسي - لا ينعزل - الا ان
 يقول له او للقاضي فيخرجه - كذا فى القنية *

It is laid down in the Kunyah :—If the *mutawalli* appointed by the founder says “I resign my *mutawalliship*” (literally I dismiss myself), this declaration has no effect (and he continues as *mutawalli*) unless the declaration is made in the presence of the founder or the *Cadi*, who would thereupon remove him (Fatawā Mahdiyyah, a collection of decisions by the Grand Mufti of Egypt Sheikh al-Islam Muhammad al-Abbasi, A.D. 1883, Volume II, page 575; also *Fatawā ‘Alamgiri*, Vol. II, page 509, l. 6).

The view taken in these texts is substantially reproduced by modern text-writers. Baillie in his Digest of Mahomedan Law, Volume I, 1st Edition, page 594, 2nd Edition, page 604, observes that while a Superintendent, may at death commit his office to another in the same way as an executor may commit his to another, a Superintendent, while alive and in good health, cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust¹. Amir Ali in his Mahomedan Law, Volume I, page 355, observes that should a *mutawalli* in his lifetime and in health appoint another in his place, the appointment will not be lawful and valid, unless the *mutawalli* has obtained the *tawliyat* with that condition in a general manner. He then quotes a passage from the Raddal-Muhtar, Volume III, page 337, to explain the meaning of the term ‘general.’ The term signifies that the *mutawalli* at the time of his appointment was such as should receive the power of transferring the trust to another and substituting that other in his own place. It is worthy of note that the prohibition against the transfer of the trust applies to the appointment of a permanent and substantive successor who occupies the position and exercises the full powers of the *mutawalli*, in fact succeeds him in the office and not merely acts as his temporary substitute in his place. In other words, the

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¹ Cf. *Fatawā ‘Alamgiri*, Vol. II, p. 508, l. 8.

[ايضاً صفحہ ۵۰۸ سطر ۸]

و اذا اراد المتولي ان يقيم غيره مقام نفسه في حيوته وصحته -
لا يجوز - الا اذا كان التفويض اليه على سبيل التعميم - هكذا
نى المحيط *

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renunciation by a *mutawalli* of his office is entirely distinct from his determination to act by a deputy. To the same effect is the statement by Sir Rowland Wilson in his Anglo-Mahomedan Law (Third Edition, Sections 328 and 329).

Tested in the light of these principles, what is the position of the parties in the case before us? Faizunnessa was in no sense a general trustee. She had no authority, express or implied, to modify in any way the terms of the trust-deed; nor had she authority to renounce the office and appoint a successor. In 1877, however, she professed to act in this manner. She gave up the office of *mutawalli* and appointed Nawab Ahsanullah as her successor. The plaintiff, who, as one of the representatives of the founder, was entitled to claim the office of *mutawalli*, was alive at the time, and according to his deposition in the present case was then about 25 years old. He had full knowledge of the circumstance that Faizunnessa had renounced the office of *mutawalli* and that Nawab Ahsanullah had taken possession of the office and of the properties appertaining thereto. He was in fact a defendant in the suit commenced by his cousin, Wahiduddin, in 1880 against Faizunnessa and Nawab Ahsanullah for appointment as *mutawalli* and for recovery of the *waqf* properties. He deposed in favour of the then plaintiff and sided with him in that litigation which terminated against his cousin in 1883. It was obviously open to him to assert his claim to the office of *mutawalli* at that time, and he deliberately abstained with full knowledge of all the circumstances. His title to the office, therefore, if any, became barred by limitation under Article 120 of the Second Schedule of the Limitation Act. In support of this view, it is sufficient to refer to the decision of their Lordships of the Judicial Committee in *Balwant Rao v. Puran Mal Chaube* (1). The same view was taken in the cases of *Jagannath Das v. Birbhadra Das* (2) and *Kidarabi Ragava Chariar v. Tiru Malai Asari Nallur Ragava-chariar* (3). It is indisputable that a claim to office and to property appurtenant thereto may be barred by limitation.

(1) (1883) I. L. R. 6 All. 1;
 L. R. 10 I. A. 90.

(2) (1892) I. L. R. 19 Calc. 776.

(3) (1902) I. L. R. 26 Mad. 113.

If the office is not hereditary, Article 120 is applicable as indicated in the cases just mentioned. If, on the other hand, the office is hereditary, Article 124 governs the matter: *Nilakandan v. Padmanabha* (1), *Alagirisami Naickar v. Sundareswara Ayyar* (2), *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (3), *Ramanathan Chetti v. Murugappa Chetti* (4) affirmed on appeal to the Judicial Committee (5), and *Lilabati Misra v. Bishun Chobey* (6). It is clear, therefore, that the claim of the plaintiff to the office of *mutawalli* became barred by imitation upon the expiry of six years from the date of the *towliatnamah* of Faizunnessa, dated the 29th January 1877. Even if Article 124 or Article 144 were held applicable, the title must be taken to have been extinguished by limitation in 1889.

It was suggested, however, that it was competent to Faizunnessa to make any arrangement for the administration of the *wagf* property to continue during her lifetime, and that consequently time ought not to run against the plaintiff till her death. This argument is in our opinion unsound, for the authorities to which we have referred establish beyond dispute that it was not competent to her to resign the office of *mutawalli* and vest it in a stranger of her choice without the intervention of the *Cadi* or of a Judicial Officer of his status. But even if the argument is conceded to be sound, it is of no avail to the plaintiff, because in our opinion the evidence makes it clear that Faizunnessa died on the 3rd June 1886, as alleged by the defendant, and not on the 28th June 1897, as alleged by the plaintiff. The Subordinate Judge has failed to appreciate the evidence on the point and has disposed of the matter in a somewhat summary manner. The evidence adduced on the side of the plaintiff is untrustworthy, and the witnesses brought forward by him are men of no position and with no special means of knowledge. The plaintiff relies upon an entry in an almanac which he does not produce. He admits that he had

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(1) (1890) I. L. R. 14 Mad. 153.

(4) (1903) I. L. R. 27 Mad. 192.

(2) (1898) I. L. R. 21 Mad. 278.

(5) (1906) I. L. R. 29 Mad. 233;

(3) (1899) I. L. R. 23 Mad. 271.

L. R. 33 I. A. 139.

(6) (1907) 6 C. L. J. 621.

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attempted to prove the age of his cousin from an entry in an almanac in the previous litigation and was disbelieved. Abdus Sobhan, who deposes in favour of the plaintiff, does not speak from personal knowledge. Arabdi Sarkar makes contradictory statements, and his assertion in cross-examination that Faizunnessa died ten or twelve years after the death of her husband wholly contradicts the story of the plaintiff. Abdul Baset, who supports the plaintiff as to the time of death, contradicts him as to the presence of respectable people at the burial, not one of whom has been called to depose on the side of the plaintiff. Against this, we have a considerable body of oral evidence on the side of the defendant in support of his allegations. Kutubuddin, a relation of Faizunnessa, an old man of considerable respectability, is positive that she died in 1886. He is supported by Mahomed Ali through whom the burial expenses were paid by Ahmadullah, the *naiib mutawalli* of the *wagf*, and also by Zamiruddin, a beneficiary under the *towliat-namah*. No serious attempt was made to cross-examine these witnesses. We are not unmindful that Nizamuddin and Abdul Majid make statements which go to support the allegation of the plaintiff, but their testimony was outbalanced by the entry in Exhibit J, the account book of Nawab Ahsanullah, in which an entry on the 3rd June 1886 was made for the funeral expenses of Faizunnessa. The book has been proved by Tarini Charan Das Gupta, the Chief Accountant of the Nawab. It is produced from proper custody, and an examination of its contents shows that it was kept in due course of business. We feel no doubt as to its genuineness, and it is not disputed that the entry in this book completely negatives the case of the plaintiff. Upon the whole evidence, then, the conclusion is irresistible that Faizunnessa died on the 3rd June 1886 and not the 28th June 1897. As Nawab Ahsanullah died on the 16th December 1901, it is obvious that the title of the plaintiff is barred by limitation, whether the six years or the twelve years rule be applied with effect from the 3rd June 1886.

It was faintly suggested as a last resource that time ought to run against the plaintiff from the 16th December 1901

when, upon the death of Nawab Ahsanullah, Nawab Salimullah came into possession of the office. It was contended that there is no privity between Nawab Salimullah and Nawab Ahsanullah in so far as the office of *mutawalli* is concerned, and it was further suggested that Nawab Ahsanullah might be deemed to have been properly appointed *mutawalli*. This position, however, is obviously untenable. The office was held by Nawab Ahsanullah adversely to every other possible claimant, admittedly for over six years, and, as we have seen, for over twelve years. Nawab Salimullah has now come into occupation not as a trespasser, but under paragraph 23 of the *towliatnamah* of Faizunnessa executed on the 29th January 1877. The plaintiff had taken no steps to challenge that deed till the 27th February 1905 when he commenced the present litigation. His claim to hold the office and to recover the properties appertaining thereto is clearly barred by limitation and cannot be successfully enforced. The second ground which relates to the *waqf* of Ayinuddin Hyder must consequently succeed.

We desire to add that we express no opinion as to the administration of the *waqf* properties by the first defendant as *mutawalli*. Allegations have been made of an adverse character, but of a more or less vague description. If any relief is sought by the beneficiaries on the ground of maladministration, it can be obtained only in an appropriate proceeding specially framed for the purpose. The only question which is determined in the present litigation is that the plaintiff is not entitled, as a matter of right, to claim the office of *mutawalli* and to eject the defendant as a trespasser.

The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge discharged, and the suit dismissed with costs throughout payable by the plaintiff to the first and fifth contending defendants.

Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharjuddin

1909.

Dec. 10

BHAJAHARI MAITI

v.

GAJENDRA NARAIN MAITI.*

Mortgage—Sale of mortgaged property—Prior Mortgagee, right of, to deposit in Court decretal amount in payment of puisne mortgage-debt.

A second mortgagee brought a suit on his mortgage making the transferees of the prior mortgagee parties to the suit, and obtained a decree; and in execution thereof the transferees applied to be allowed to deposit in Court the full amount of the second mortgage-debt in order to save the property from sale. The Court of first instance allowed the application; but, on appeal, the District Judge set aside the order of the first Court:—

Held, that the transferees of the prior mortgagee were entitled to pay off the mortgage-debt due on the subsequent mortgage to save the mortgaged property from sale.

SECOND APPEAL by Bhajahari Maiti and another, the transferees of the prior mortgagee.

The facts are briefly these. The respondent, Gajendra Narain Maiti, a puisne mortgagee, obtained on a suit to realize his security a decree for sale of the mortgaged property. The appellants, who were the transferees of a prior mortgagee, were made parties to the suit, and in execution of the decree they applied for permission to save the sale of the mortgaged property by depositing in Court the whole of the decretal amount in full satisfaction of the debt due to the puisne mortgagee.

The Munsif allowed this application, and the sale was consequently not held. But on appeal, preferred by Gajendra Narain, the learned District Judge set aside the order of the first Court, holding that the prior mortgagee had no right to redeem.

*Appeal from Order No. 24 of 1909 against the order of E. F. Forrester, District Judge of Midnapore, dated Nov. 4, 1908, reversing the order of Ram Dulal Deb, Munsif of Contai, dated July 17, 1908

The transferees of the prior mortgagee, thereupon, appealed to the High Court.

Babu Kally Krishna Sen, for the appellants.

Babu Haribhushan Mukerjee and *Babu Ashitaranjan Chatterjee*, for the respondent.

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BRETT AND SHARFUDDIN JJ. The present appeal is against an order of the District Judge of Midnapore setting aside on appeal an order passed by the Munsif, first Court, of Contai, on an application made by the present appellants in a proceeding in execution of a decree on a mortgage bond obtained by a second mortgagee. It appears that the respondent, who was the second mortgagee, brought a suit on his mortgage, making the present appellants, who are alleged to be the transferees of the prior mortgagee, parties defendants. A decree was obtained by the respondent, and execution was sought by sale of the mortgaged property. The appellants applied to be allowed to deposit the full amount of the mortgage-debt in payment of the decree and so to save the property from sale. They alleged that they had purchased the entire rights of the mortgagor in the mortgaged property, and they claimed, as such purchasers, to be entitled to pay off the full mortgage-debt due to the decree-holder. The Court of first instance held that the appellants were entitled to deposit the money in payment of the decree, and that Court went on to explain that this was in order to prevent multiplicity of litigation. The learned Judge has set aside that order, and we are unable to say that his judgment is very clear, or that it shows that he has quite grasped the position of the parties and the rights claimed by the appellants. So far as we can gather, there was no real dispute that the present appellants had purchased the rights of the original mortgagor; but whether they had purchased or not, we think that the view of the law which the learned Judge has taken is not correct. Even supposing that the appellants were held to occupy the position of prior mortgagees, we are of opinion that there is nothing in the law to prevent

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them, in a case like the present, where they have been made parties to the suit by the second mortgagee, from claiming their right to pay off the second mortgage and so save from sale the property which stands as security for their mortgage-debt.

It has been contended on behalf of the respondent that a prior mortgagee has no right, even when he is made a party to the suit brought by the puisne mortgagee on his mortgage, to pay off the second mortgage in order to save the property from sale. If he has not that right, it is difficult to understand what is the use or necessity of making him a party to the suit at all. In our opinion, he is made a party to the suit in order to give him an opportunity, if he wishes, to pay off the second mortgage, if the mortgagor refuses to pay it off, and so to save the property which stands as security for his mortgage from being sold. The learned pleader for the respondent contends that, under the law, a prior mortgagee must stand by the suit brought by a puisne mortgagee and allow the property to be sold subject to his mortgage lien, and then, when this is done, he must bring a fresh suit on his own mortgage, resell the property, and so recover his own mortgage debt. We do not think that, under the law, this is necessary ; and in several cases it has been held by this Court that a prior mortgagee, in an application under section 244 of the Code of Civil Procedure in execution, is entitled to have his rights settled without being put to the extra expense and unnecessary trouble of bringing a fresh suit. This was the view which was taken by us only recently in the case of *Gobind Prosad Misser v. Lachmi Chandra Marwari*† (S.A. 2088 of 1906), and we think that this is the view which we should adopt in the present case. In our opinion the present appellants, certainly as purchasers, if they are entitled to that position which seems to us to have been conceded in the Court of first instance though it was questioned in the lower Appellate Court, and equally so, if they are prior mortgagees, are entitled to pay off the mortgage-debt due on the second mortgage in order to save from sale the property which they (appellants), if they are the purchasers,

† Unreported,

have purchased, or which, if they are the prior mortgagees, has been hypothecated to them as security for their mortgage-debt.

The result, therefore, is that we decree the appeal, set aside the judgment and order of the lower Appellate Court, and restore those of the Court of first instance with costs in all Courts. As the Court of first instance has not fixed the time within which the deposit is to be made by the present appellants, we think that the order should run as follows :— That the present appellants are entitled to deposit, within one month from the date of the arrival of the record in the Court of first instance, the sum which shall be found, on an account being taken by that Court, to be due to the second mortgagee in discharge of his mortgage-debt, with costs and interest up to the date of payment. On their failure to do so, execution of the decree of the opposite party will proceed.

Appeal allowed.

B. D. B.

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CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

HARAN MANDAL

v.

MOHIM CHANDRA PRAMANIK*.

1910
Jan. 4.

Dispute concerning land—Tenant interested in the subject of dispute—Addition of the tenant to the proceedings to show that there is no dispute likely to cause a breach of the peace—Criminal Procedure Code (Act V of 1898), s. 145, cl. (5).

A person claiming to be interested in the subject of dispute as a tenant, who was not required to attend as a party, should be heard under s. 145 (b) of the Criminal Procedure Code in order to show that no dispute likely to cause a breach of the peace exists.

On the report of the Sub-Inspector of Police of the Dracope thana, alleging an apprehension of a breach of the peace, the

* Criminal Revision No. 1316 of 1909, against the order of H. P. Bhattacharjee, Deputy Magistrate of Khulna, dated Aug. 16, 1909.

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Deputy Magistrate of Khulna instituted a proceeding under section 145 of the Criminal Procedure Code in respect of a plot of land in Bajna *abad* against Mohim Chandra Pramanik and others, first party, and Jogendra Mandal and others, second party. On the day fixed for the filing of the written statements the petitioner, who had not been required to attend as a party, but was casually present in Court, filed an application before the Magistrate alleging that he was a tenant of a part of the land in dispute and praying to be added as a party. The Magistrate refused the application and proceeded with the case, holding, by his order dated the 16th August 1909, that the first party was in actual possession.

The petitioner then moved the High Court and obtained a rule to show cause why such order should not be set aside and the proceedings continued in order that the petitioner might be heard under section 145, sub-section (5) of the Code.

Babu Narendra Kumar Bose, for the petitioner.

No one for the opposite party.

STEPHEN AND CARNDUFF JJ. This is a rule to show cause why an order under section 145 of the Criminal Procedure Code should not be set aside and the proceedings continued in order that the petitioner may be heard under sub-section (5) of that section. The petitioner swears that he is interested in the land in dispute as a tenant of a part of it. There is nothing to show that this is not the case, although the Magistrate considered that his application to be made a party was a mere device on his part, acting as a creature of the second party. The petitioner seems to give reasons for supposing that this may not be true, and we consider that he should be allowed to show that there is no dispute under the fifth paragraph of the section. No one appearing to show cause, we make the rule absolute and order accordingly in terms of the rule.

Rule absolute.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

RAJANI KHEMTAWALI

v.

PRAMATHA NATH CHOWDHRY.*

1910

Jan. 11

High Court, Criminal Revisional Jurisdiction of—Order by a first-class Magistrate for discontinuance of a house as a brothel—Criminal Procedure Code (Act V of 1898), ss. 6, 435 and 439—Eastern Bengal and Assam Disorderly Houses Act (II of 1907), ss. 2 to 6—Procedure in cases under ss. 3 and 6 of the Act—Offence.

A Magistrate of the first class, acting under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act, 1907, is a "Criminal Court" within s. 6 of the Criminal Procedure Code, and the High Court has jurisdiction to revise his proceedings under ss. 435 and 439.

But where such proceedings were in themselves perfectly fair and reasonable, the only error being possibly the administration of oaths to the witnesses, the High Court refused to interfere.

Sections 2 and 3 of the Act do not create any offence, the only offence created by the Act being, as provided in s. 6, disobedience to the order of the Magistrate passed under s. 3.

The procedure to be followed under the Act is that, upon a sanction, report or order under s. 5, the Magistrate must, if he intends to go further, summon the owner or other person mentioned in s. 3 to show cause, and in the event of his failure to appear, he may proceed in his absence. He must next satisfy himself that the house is used as described in s. 2 (a), (b) or (c), doing so in any way that does not violate the ordinary rules of fairness and propriety; but he is not bound to act only on legal evidence, and he need not, and possibly may not, administer oaths to persons of whom he may make enquiry. If he makes an order under s. 3, proceedings for disobedience must be taken independently under s. 6, and conducted according to the ordinary procedure prescribed for the trial of offences.

Criminal Revision No. 1309. On 31st March 1909 one Pramatha Nath Chowdhry and three others made a joint application before the District Magistrate of Rungpur against the petitioners and others, thirty in number, under section 2 (b) of the Eastern Bengal and Assam Disorderly Houses Act

* Criminal Revision Nos. 1309 and 1311 of 1909, against the orders of B. V. Nicholl, Sessions Judge of Rungpur, dated Oct. 14, 1909.

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(II of 1907), alleging that they carried on prostitution in houses in the vicinity to the annoyance of the neighbours and the detriment of the morals of the youths of the educational institutions situated in close proximity. This application related to the northern block of the prostitutes' quarters in the town.

Criminal Revision No. 1311. On the same day another application of a similar character, under section 2 (b), and containing similar allegations, was filed by Ram Nath Mitra and four others against 108 persons occupying the southern block separated by a road from the northern.

The District Magistrate made over both cases for disposal to Babu R. C. Dass, a first-class Deputy Magistrate, who, after holding a local inquiry, issued notices, on the 14th April, under section 2 (b) of Act II of 1907, to the two sets of parties in the two cases, who were owners and tenants living with them, to show cause within seven days why the use of the houses mentioned therein for habitual prostitution to the annoyance of the neighbours should not be discontinued. The cases were afterwards transferred by the District Magistrate, on the 4th June, to Babu G. C. Das, another first-class Deputy Magistrate, for hearing. The latter examined a number of witnesses on oath on both sides, and then held a local inquiry and made a house-to-house visit of inspection, in the presence of both parties, on the 22nd August, putting on the record a memorandum of his inspection. He, however, recorded the evidence only once.

The defence in both cases was that some of the petitioners were dancing girls and some betel sellers, while the others were kept mistresses, or too old to carry on their trade to the annoyance of their neighbours. They also filed a map of the locality.

On the 29th September the Magistrate, by a separate order in each case, found as a result of his local inspection and from the evidence that the sites of the educational institutions in the vicinity were not correctly shown in the petitioners' map, that there were no kept mistresses at all, nor dancing girls who were not at the same time carrying on prostitution, though there were in each set of defendants some who were too old

for prostitution or were engaged in other occupations. His order in the case, which was the subject of *Criminal Revision No. 1309*, concluded as follows :—

I am satisfied from the evidence adduced before me, and from what I have seen myself that, with the exception of the eight defendants named above, the houses of the remaining defendants situated in the vicinity of educational institutions are used as brothels and for the purposes of habitual prostitution, and they are also used as such to the annoyance of the petitioners and other residents of the vicinity. The case, therefore, falls within the purview of s. 2 cl. (a) and (b). I, therefore, direct all the defendants, except the eight, under s. 3, to discontinue the use of their houses as brothels or for habitual prostitution or as disorderly houses, within three weeks from the date of service of this order.

A similar order in substantially the same terms was passed in the case which was the subject of *Criminal Revision No. 1311*. The District Magistrate and the Sessions Judge declined to interfere with the orders on the 13th and 14th October respectively. The petitioners then presented separate applications to the High Court and obtained the two Rules mentioned on the same grounds, viz., (i) that there was a misjoinder of parties, (ii) that on the facts found it was not shown that any house was used to the annoyance of the inhabitants of the vicinity, (iii) that the procedure of the Magistrate was irregular in that he did not limit his inquiry to clause (b) of section 2 of the Act, and (iv) that he acted without jurisdiction in conducting the local inquiry.

Babu Dasharathi Sanyal and *Babu Sarat Chandra Lahiri*,
for the petitioners.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

STEPHEN AND CARNDUFF JJ. This case arises under the Eastern Bengal and Assam Disorderly Houses Act, 1907, and raises a question of some importance as to its proper construction. The facts relevant to the point before us are as follows. A complaint was made to the District Magistrate of Rungpur by four householders, under section 5 (c) of the Act, that certain houses were used by the petitioners before us for the purpose of habitual prostitution and to the annoyance of the inhabitants of the vicinity, as mentioned in section 2 (b). The case

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was thereupon made over to a Deputy Magistrate, and notices were issued to all the petitioners under section 2, and, it is said, under clause (b) of that section. On the petitioners appearing before him, the Deputy Magistrate proceeded to hear witnesses on oath on both sides, proceeding as though he were trying persons accused of an offence, and then himself visited the houses of the petitioners and other persons concerned. Acting on the information he received from these two sources, he came to the conclusion that the case fell under section 2, clauses (a) and (b), and he, therefore, made an order on all the petitioners to discontinue the use of their houses as brothels, or for habitual prostitution, or as disorderly houses, within three weeks of the date of the service of the order. A rule has been granted to show cause why this order should not be set aside on four grounds, which we need not discuss until we have settled a preliminary point, namely, whether we have jurisdiction to deal with the matter under section 435 of the Criminal Procedure Code. This depends on whether the Court making an order under section 3 is a Criminal Court. The point has already been raised before the District Magistrate and the Sessions Judge. The order of the former is not before us; but he refused to interfere. The latter expressed an opinion, which seems to have been held by the District Magistrate also, that the Court was a Criminal Court, but, without actually deciding the point, he refused to interfere on the merits.

The grounds for holding that the Deputy Magistrate in this case was a Criminal Court are that by section 2 of the Act the information, which lies at the root of the proceedings, is to be received by a first-class Magistrate, that is, an official whose character is determined by the Criminal Procedure Code, and that section 5 of the Act mentions "prosecutions" under section 2. On the other hand, it is argued by the Deputy Legal Remembrancer that the only offence created by the Act is disobedience to an order made under section 3, which is made punishable by section 6, and it is contended that no Court can be a Criminal Court unless it is dealing with the commission of an offence, which the Court in this case was not. The scheme

of the Act is that a warning may be given under section 3, and continued disobedience to that warning is an offence. It is to be observed that the Court that convicts under section 6 need not be the same as that which makes the order under section 3. Proceedings under section 2, which are the basis of an order under section 3, are, no doubt, described as a "prosecution" in section 5; but, as fresh proceedings have to be taken in the case of a prosecution under section 6, the word seems inapt for its purpose, and cannot be taken by itself to show that a Court acting under section 3 is a Criminal Court within the meaning of section 435 of the Code.

Comparing the weight due to these two sets of arguments, we consider that the first must prevail on the ground that a first-class Magistrate is a Criminal Court. The meaning of the phrase depends entirely on section 6 of the Criminal Procedure Code, under which a first-class Magistrate constitutes one of "five classes of Criminal Courts" created by law, and there is nothing in the Eastern Bengal Act to deprive the term of its usual meaning: nor can we regard the obvious scope of the Act, which we will consider in a moment, as having that effect. We do not attach much weight to the word "prosecution" in section 5, which is plainly a mistake, as the only prosecution possible under the Act is one under section 6. We consider, therefore, that we have jurisdiction to act under sections 435 and 439 of the Code.

But here we are met with another difficulty. We agree with the contention of the Crown that sections 2 and 3 do not create any offence, and that the only offence created by the Act is that created by section 6. The power conferred by sections 2 and 3 is not a power to hold a criminal trial or to take any preliminary proceedings under the Criminal Procedure Code. It is a power similar to the powers conferred on Criminal Courts by Chapters VIII, X, XI and XII of the Code. But whereas those Chapters prescribe the procedure that Criminal Courts are to follow in various cases where they are not dealing with the trial of offences and, therefore, give this Court ground for interfering where the proper procedure is not followed, no

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procedure is prescribed by the present Act, except such as is indicated by the last part of section 2 and sections 4 and 5. Apart from these enactments, the Court in making an order under section 3 has no duty except to satisfy itself that the house in question is used as described in clauses (a), (b) and (c) of section 2. This it may do in any way that is not manifestly improper; but it does not seem that the Court has any power to administer an oath. The effect of sections 3 and 4 is as follows. By section 3 the Magistrate may summon the owner, etc., of the house to show cause why a certain use of the house should not be discontinued; by section 4, if the owner does not obey the summons, the Magistrate may make an order *ex parte*, which must be taken to imply that he may not do so otherwise: and consequently the owner or other person, against whom it is proposed to proceed, must be summoned under section 3. The course of proceeding to be pursued under the Act is, therefore, as follows. On sanction being given, or a report or complaint made, under section 5, the Magistrate must, if he means to proceed further, summon the owner or other person mentioned in section 3 to show cause as described in that section. If he does not appear, the Magistrate may proceed in his absence. He must then satisfy himself that the house is used as described in section 2, clause (a), (b) or (c), and he may do this in any way that does not violate the ordinary rules of fairness and propriety; but he is not bound to act only on legal evidence, and he need not, possibly he may not, administer oaths. He is not acting under the Criminal Procedure Code, but he is in fact performing an administrative, and not a judicial, duty. If he makes an order under section 3, disobedience to it will be an offence; but proceedings to punish that offence must be taken independently of proceedings under sections 2 and 3, and must, of course, be conducted according to the ordinary law. All that is effected by the proceedings under sections 2 and 3 is, therefore, to lay a foundation for a prosecution under section 6, and such proceedings need not, and probably cannot, be carried on in the manner appropriate to proceedings for the actual prosecution of an offence. The grounds stated in the rule are all framed

on the contrary assumption, and refer to matters which would be of importance in proceedings in the prosecution of an offence, but have no importance in relation to the proceedings in this case. The proceedings in this case have been perfectly fair and reasonable in themselves, the only error committed being that the Magistrate had oaths administered to witnesses, which he need not, and possibly ought not, to have done. The result is that no case has been made out for our interference, and the rule is discharged.

This order will apply to Revision Case No. 1311 of 1909.

Rule discharge.d

E. H. M.

APPELLATE CIVIL.

Before Mr. Justice Doss and Mr. Justice Richardson.

DURGA PRASAD SINGH

v.

RAJENDRA NARAIN BAGCHI.*

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Aug. 26.

Lease—Evidence—Letter containing all the elements of a lease, whether admissible in evidence without registration—Payment of rent at a reduced rate on the basis of that letter, effect of—Conflicting descriptions of the subject-matter of a grant—Lessee not put in possession of specific area mentioned in the lease, effect of—Mistake of fact.

In a suit for rent at a certain rate, the lessee pleaded that by virtue of a letter addressed to him by the lessor, the latter was entitled to get rent only at a reduced rate. The letter contained a definition of the reduced rental, recited the area of the land demised under the lease, the nature of the interest granted by the lease, and the instalments in which rents were payable:—

Held, that the letter being a non-testamentary instrument, which purported to limit in future a vested interest of the value of Rupees one hundred and upwards in immoveable property, was not admissible in evidence without being registered.

Biraj Mohinee Dasee v. Kedar Nath Karmakar (1) referred to.

Held, also, that the mere fact that rent for some years had been received at the reduced rate did not bind the lessor to accept rent at that rate in future,

*Appeals from Original Decrees, Nos. 291 and 318 of 1907, against the decrees of Bepin Behari Chatterjee, Subordinate Judge of Manbhum, dated April 27, 1907.

(1) (1909) I. L. R. 35 Cal. 1010.

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inasmuch as, even if the letter had been treated as an agreement for reduction of rent, it was not enforceable in law, having been made without consideration.

Where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter.

Newson v. Pryor's Lessee (1) referred to.

But where these two elements—the boundaries and the quantity—are equally certain and exactly defined, or the boundaries are as precise and definite as the quantity is specific and exact, and there is gross divergency between the quantity specified and the quantity found to be included within the defined boundaries, preference should be given to that element of the description of the subject-matter which is more consistent with the intention of the parties to be collected from the other parts of the deed, illuminated, if necessary, by the surrounding circumstances and the subsequent conduct of the parties.

Lord v. The Commissioners for the City of Sydney (2), *White v. Luning* (3), *Crogham v. Nelson* (4) and *Holmes v. Trout* (5), referred to.

Where a lease is taken of a specific quantity of land within definite boundaries, both the lessor and the lessee, being under a common mistake that such quantity exists within the boundaries, while in fact it is much less, there is no valid contract, and the parties are entitled to rescission thereof; but the defendant has the option to affirm the contract, and hold the lease for the lesser quantity with proportionate abatement of rent.

Paget v. Marshall (6), *Harris v. Pepperell* (7), and *Garrard v. Frankel* (8) referred to.

APPEAL by the plaintiff, Raja Durga Prasad Singh, in appeal No. 291 of 1907, and by the defendants in appeal No. 318 of 1907.

These two appeals arose out of a suit brought by the plaintiff to recover from the defendants, under a *mawrasi mokurari* lease, arrears of rent, cesses and interest due for the years 1307 to 1312 B.S. It appeared that defendant No. 1 executed a *kabuliat* in favour of the predecessor in title of the plaintiff on the 28th of Agrahayan, 1301 B.S., and the suit was based on the basis of this *kabuliat*. Defendants Nos. 2 to 9 were alleged to be co-sharers of defendant No. 1, and thus they were made parties to the suit.

(1) (1822) 7 Wheaton U. S. 7.

(2) (1859) 12 Moo. P. C. 473;

14 Eng. R. 991.

(3) (1876) 93 U. S. 514.

(4) (1845) 3 How. U. S. 187.

(5) (1833) 7 Pet. U. S. 171.

(6) (1884) 2 Ch. D. 255.

(7) (1867) 5 Eq. 1.

(8) (1862) 30 Beav. 145.

The defendants pleaded, *inter alia*, that they were in possession of a considerably less quantity of land than taken settlement of by them under the said *kabuliat*, and as such they were entitled to abatement of rent in proportion to the diminished area in possession; that they made a tender by postal money order of the rent due, which was, however, refused, and so they were not liable to pay interest and costs, and that they were not bound to pay the cesses claimed under the lease. The defendants further pleaded that at their solicitation the predecessors in interest of the plaintiff, by a *hukumnama* or letter dated the 22nd Aghraayan 1305 B.S. (7th of December 1898), addressed by the latter to defendant No. 1, reduced the rate of rent from Rs. 7 per bigha reserved in the *maurasi mokurari* lease to Rs. 5 per bigha, and accepted the reduced rent for the years 1305 and 1306 B.S.

The Court of first instance having come to the conclusion that the letter was admissible in evidence without being registered, held that the defendants were only liable to pay rent at the rate of Rs. 5 per bigha on the 400 bighas demised in the lease. As regards the question of the quantity of land, the Court below held that the defendants were in possession of 346 and odd bighas, and that there being a provision in the lease against the enhancement or abatement of rent, the defendants were not entitled to any abatement of rent, and that they were not liable to pay cesses and interest as claimed.

Against this decision both the plaintiff and the defendants appealed to the High Court.

In appeal No. 291 of 1907,

Dr. Rashbehary Ghose (with him *Babu Jogesh Chandra De* and *Babu Lalit Mohan Ghose*), for the appellant. Under the provisions of the Transfer of Property Act and the Registration Act, the letter by which the predecessor of the plaintiff reduced the rate of rent was not admissible in evidence: *Biraj Mohinee Dasee v. Kedar Nath Karmakar* (1). I also rely on the cases of *O'Connor v. Spaight* (2) and *Subramanian Chettiar*

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(1) (1908) I. L. R. 35 Calc. 1010.

(2) (1804) 1 Sch. & Lef. 305.

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v. *Arunachalam Chettiar* (1). The letter is a part of the lease ; it qualifies the lease : see Shephard and Brown's Transfer of Property Act, page 489, and the cases of *Ex-parte Hall* (2) and *Radha Raman Chowdry v. Bhowani Prasad Bhowmik* (3). The case of *Satyesh Chunder Sircar v. Dhunpul Singh* (4) is distinguishable from the present case. Besides, the agreement for reduction of rent as evidenced by the letter was void for want of consideration : *Morgan v. Rainsford* (5) and *Fitzgerald v. Lord Portarlington* (6). The plaintiff was entitled to claim interest, inasmuch as there was no valid tender : *Jagat Tarini Dasi v. Naba Gopal Chaki* (7) and *Kripa Sindhu v. Annada Sundari* (8). The defendants were bound to pay cesses to the plaintiff, unless they could show that they had already paid them to the Collector ; but there is no evidence of such payment.

The Advocate-General (The Hon'ble Mr. S. P. Sinha) (with him *Babu Ram Chandra Mazumdar, Babu Tarak Chandra Chuckerbutty* and *Babu Hemendra Nath Sen*), for the respondents. The letter, dated the 22nd Agra-hayan 1305 B.S., is admissible in evidence. To the present case the English cases cited have no application. The case of *Biraj Mohinee Dasee v. Kedar Nath Karmakar* (9) in no way detracts from the authority of the case of *Satyesh Chunder Sircar v. Dhunpul Singh* (10). The subsequent written agreement to abate rent did not amount to a creation of a new lease ; it was merely a variation of the lease, and, therefore, registration was not necessary. A suit for rent is not a suit for land. The cases of *Obai Goundan v. Ramalinga Ayyar* (11) and *Beni Madhub Gorani v. Lalmoti Dass* (12) support my contention.

The plaintiff is not entitled to the royalty claimed, for we tendered the rent for previous years and he refused to accept it. The Subordinate Judge also considered the defendants wealthy enough to pay the rent whenever demanded. The

(1) (1902) I. L. R. 25 Mad. 603.

(2) (1879) 10 Ch. D. 615.

(3) (1901) 6 C. W. N. 61.

(4) (1896) I. L. R. 24 Calc. 20.

(5) (1845) 8 Ir. Eq. 299.

(6) (1835) 1 Jones (Irish) 431, 435.

(7) (1907) I. L. R. 34 Calc. 305, 324.

(8) (1907) I. L. R. 35 Calc. 34 50.

(9) (1908) I. L. R. 35 Calc. 1010.

(10) (1896) I. L. R. 24 Calc. 20.

(11) (1898) I. L. R. 22 Mad. 217.

(12) (1898) 6 C. W. N. 242.

question of the payment of cesses was not raised in the lower Court.

Dr. Ghose, in reply. I rely on the provisions of the Registration Act and the Transfer of Property Act, and my submission is that, if we could do away with the terms of a registered lease by an unregistered agreement, by successive unregistered documents, all the terms of such a lease might be thus varied.

In appeal No. 318 of 1907,

Mr. Sinha, for the appellants. The question is, whether the defendants are to have certain acres of land or a certain plot of land within specified boundaries. The conduct of the parties shows that the dominant intention of the parties was that they should be governed by the area. The defendants are entitled to have possession of the full quantity of 400 bighas of land specified in the lease. I rely on the cases of *Imambandi Begum v. Kamleswari Pershad* (1) and *Jarao Kumari v. Lalonmoni* (2). They are also entitled to an abatement of rent, inasmuch as the evidence shows that they are in possession of only 275 bighas, and have been practically evicted from the rest of the land: *Siba Kumari Debi v. Bipradas Pal Chowdhury* (3), *Herrick v. Sizby* (4) and *Llewellyn v. Earl of Jersey* (5).

Dr. Ghose, for the respondents. There is no question of eviction from the demised land. The boundaries given in the lease are not uncertain, nor is the lease ambiguous; the rights of the parties must be governed by it: see Norton on Deeds, page 220, and also *Kazee Abdool Mannah v. Buroda Kant Banerjee* (6), *Nunda Laul Mukherjee v. Kymuddin Sardar* (7) and *Satyendra Nath Thakur v. Nilkantha Singha* (8). Acreage was here a matter of description. I rely also on the cases of *Okill v. Whittaker* (9), *Okill v. Whittaker* (10), *Besley v. Besley* (11) and *Clayton v. Leech* (12). There was a covenant in the lease that the rent was never to be varied, and so the

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(1) (1894) I. L. R. 21 Calc. 1005.

(2) (1890) I. L. R. 18 Calc. 224.

(3) (1908) 12 C. W. N. 767.

(4) (1867) L. R. 1 P. C. 436, 452.

(5) (1843) 11 M. & W. 183; 63 R. R. 569.

(6) (1871) 15 W. R. 394.

(7) (1905) 9 C. W. N. 886.

(8) (1893) I. L. R. 21 Calc. 383.

(9) (1847) 1 DeG. & Sm. 83.

(10) (1847) 2 Phill. 338.

(11) (1878) 9 Ch. D. 103, 109.

(12) (1889) 41 Ch. D. 103.

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defendants are not entitled to any abatement. The cases of *Dwarka Nath Chattopadhyaya v. Bhogoban Panda* (1) and *Earl of Durham v. Sir Francis Legard* (2) support my contention. Besides, their claim to abatement is barred by limitation, the period of limitation being six years from the time when they were put in possession: *Durga Pershad v. Ghosita-Goria* (3) and *Ram Narain Chuckerbutty v. Poolin Behary Lall Singh* (4).

Mr. Sinha, in reply. The claim is not barred, as it is a recurring cause of action.

Cur. adv. vult.

Doss J. These two appeals arise out of an action to recover arrears of rent due under a *maurasi mokurari* lease dated the 18th Agrahayan 1301, corresponding to the 3rd December 1894, of underground coal in Mouza Dubari belonging to the plaintiff. The arrears claimed are for the years 1307 to 1312 at the rate of Rs. 2,800 per annum, together with interest for overdue instalments. The defence raised by the defendants is that at their solicitation the predecessors in interest of the plaintiff by a sanad or letter dated the 22nd Agrahayan 1305, corresponding to the 7th December 1898, addressed by the latter to defendant No. 1, reduced the rate of rent from Rs. 7 per *bigha* reserved in the *maurasi mokurari* lease to Rs. 5 per *bigha*, and fixed the annual rental at Rs. 2,000 in lieu of Rs. 2,800, and accepted the reduced rent for the years 1305 and 1306; they further pleaded that in pursuance of the terms of the lease the plaintiff had put them in possession of a certain defined area as being the area demised; that they carried on their mining operations within that area and expended large capital; that thereafter the plaintiff, in the year 1902, brought a suit, being No. 41 of that year, against them, wherein it had been finally decided by this Court on appeal that under the lease they are not entitled to any lands beyond the *thak* boundaries of the Mouza on the north, west and south; that the effect of this decision has been to reduce the extent of the area demised under the lease from 400 *bighas* to 274 *bighas* 4 *cottahs*;

(1) (1880) 7 C. L. R. 577.

(3) (1885) I. L. R. 11 Calc. 184.

(2) (1865) 34 Beav. 611.

(4) (1878) 2 C. L. R. 5.

that they are only liable to pay rent on this latter area at the rate of Rs. 5 per *bigha*, i.e., at the rate of Rs. 1,371 annually; that they are entitled to a refund of the bonus, rent and interest; that they duly tendered the rent payable by them, but that the plaintiff refused to accept the same; that, consequently, they are not liable to pay any interest; and, lastly, that they duly paid the cesses directly into the Collectorate. The sanad or letter, dated the 7th December 1898, was not registered, and hence the question whether the defendants were entitled to claim reduction of rent depended upon the further question whether that letter was admissible in evidence. The Court below has answered the question in the affirmative; and has held that the defendants are only liable to pay rent at the rate of Rs. 5 per *bigha* on the 400 *bighas* demised under the lease, or in other words, at the rate of Rs. 2,000 per annum. As regards the other question, whether the defendants are in possession of 274 *bighas* or more, the Court below has held that the defendants are in possession of 346 and odd *bighas* excepting a small quantity, namely, 1,600 square feet, and that there being a provision in the lease against any enhancement or abatement of rent, the defendants were not entitled to an abatement of the rent of Rs. 2,000 per annum; and, lastly, that the defendants are not liable to pay cesses or interest as claimed. The Court below accordingly decreed the suit in part and dismissed it as to the rest of the claim.

From this judgment and decree both parties have appealed to this Court, each of them challenging the adverse findings of the Court below. The plaintiff has preferred appeal No. 291 of 1907, and the defendants have preferred appeal No. 318 of 1907. In appeal No. 291 of 1907 the cardinal questions for consideration are, first, whether the letter, dated the 7th December 1898, is admissible in evidence without registration; and, secondly, supposing that it is admissible, whether it is founded on good consideration, so as to be enforceable. The letter is addressed to defendant No. 1 and is in these terms: "That you are in possession and enjoyment of 400 *bighas* of land in Mouza Dabaru in Pergunnah Jharria, and have previously

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taken *mokurari* settlement of the same, at an annual rental of Rs. 2,800. But being unable to bear the annual rent of Rs. 2,800, you have filed an application before me for fixing the *mokurari* rent for the 400 *bighas* at Rs. 2,000 by reducing the rate to Rs. 5 per *bigha*, on the ground that on most part of the said coal lands there is no coal fit for use, and the coal that exists in the remaining land is not saleable as steam coal. Your prayer being considered reasonable, the *mokurari* rent for the said coal is fixed at the rate of Rs. 5 per *bigha* per annum, i.e., at Rs. 2,000 per annum for the said 400 *bighas* with effect from the 1st Baisak 1305 B.S." The letter goes on to state that the rents are payable in three instalments, namely, in the month of Sraban, Agrahayan and Chaitra, that interest on overdue instalments is to be paid at the rate of 2 per cent. per mensem, and in the event of three consecutive instalments being unpaid, the concession as to rate of the rent shall cease and the terms of the original lease would revive.

On behalf of the appellant it has been contended that this letter is a non-testamentary instrument which purports to limit in future a vested interest of the value of Rs. 100 and upwards in immoveable property, and that its registration is therefore compulsory under section 17, clause (b) of the Registration Act, III of 1877; and that not being so registered it cannot, under section 49 of that Act, be accepted as evidence of any transaction affecting any such property. I think this contention is well-founded.

Besides a definition of the reduced rental, the document contains a recital of the area of land demised under the lease, the nature of the interest granted by the lease, and the instalments in which the rents were payable. In other words, all the essential elements of a lease are contained in it. I think, therefore, the case is close upon the case of *Biraj Mohinee Dasee v. Kedarnath Karmakar* (1), where a petition of compromise filed in a criminal proceeding, and containing the essential elements of a lease, was held, for want of registration, inadmissible in a suit for rent based upon it. But even if it be treated

(1) (1908) I. L. R. 35 Calc. 1010.

merely as an agreement for reduction of the rent, it is in effect an agreement purporting to limit an interest in immoveable property. It has been held that a covenant by a lessor for an abatement of rent is within the Statute of Frauds, for the agreement is for a release of a part of the rent [see Dart on Vendors and Purchasers, 7th Edn., pages 219-220], and therefore affects an interest in land: see *O'Connor v. Spaight* (1). It has been held in *Ex parte Hall* (2) that an agreement to charge future rent is a contract charging an interest in land, and therefore falls within the purview of the Statute of Frauds.

That an agreement which affects the incidents of the tenure created by a lease, or in other words, which forms a part of the terms of the holding under the lease, is not admissible without registration, follows clearly from the *ratio decidendi* of the judgment of their Lordships of the Privy Council in *Subramanian Chettiar v. Arunachalam Chettiar* (3). In that case the lessee, under a reversionary lease, executed on the 4th July 1895, but which was to come into operation in 1912, after the expiry of some leases affecting the same property then subsisting, verbally agreed, in consideration of the lessor granting him the lease to pay to the latter the sum of Rs. 500 a month for a period of ten years from July 1895. This arrangement was put in writing in the form of a letter addressed by the lessor to the lessee. Their Lordships, after quoting the provisions of section 92 of the Evidence Act, section 17 of the Registration Act (III of 1877), and sections 105 and 107 of the Transfer of Property Act, thus observed: "The agreement for the payment of Rs. 500 a month for ten years from July 1895 is in no way inconsistent with the lease of the 4th of that month. Its provisions form no part of the terms of the holding under the lease; their effect will be exhausted some years before the lease takes effect. The payment bargained for is no charge on the property; it is not rent, nor recoverable as rent, but a mere personal obligation collateral to the lease. Their Lordships

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(1) (1804) 1. Sch. & Lef. 305, 306.
(2) (1879) 10 Ch. D. 615.

(3) (1902) I. L. R. 25 Mad. 603;
L. R. 29 I. A. 133.

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are of opinion that the agreement was not affected by section 92 of the Evidence Act, and that there is nothing in the Registration Act, or in the Transfer of Property Act, which required that it should be registered as part of the lease. In the course of the argument before their Lordships, Lord Davey said—"it (*i.e.*, the agreement) had nothing to do with the incidents of the tenure. It did not affect the incidents of the tenure in any way." It is quite manifest, from the reasons I have just quoted, that if the agreement varied or affected any of the terms of the holding under the lease, or in other words, any of the incidents of the tenure, and above all, if it varied the rent, it would, in their Lordships' opinion, attract the provisions of the Registration Act and the Transfer of Property Act. An application of the same principle to the case of a mortgage is illustrated in the case of *Tika Ram v. The Deputy Commissioner of Bara Banki* (1), where the mortgagor had by a separate unregistered *rukka* or written promise agreed to pay to the mortgagee interest at a higher rate than that stipulated for in the mortgage. Their Lordships of the Privy Council held that this unregistered document, which could not affect the property, could not control the original mortgage, so as to fetter the equity of redemption arising under it. If it were open to the parties to alter any of the terms or incidents of a lease by an unregistered instrument, it seems to me that the result would be that they would be capable of altering every one of the terms of the lease by separate unregistered documents, so that all the incidents of the original lease would vanish, and the rights of the parties and the incidents of the lease would be regulated entirely by unregistered documents. This inevitable consequence has been very forcibly emphasized by Bramwell B. with reference to the analogous provision in the Statute of Frauds in *Sanderson v. Graves* (2), where he said—"unless a note in writing is necessary in every case of alteration, it is required in none, so that in the name of alteration, something wholly different might be established."

(1) (1899) I. L. R. 26 Calc. 707 ;

(2) (1875) L. R. 10 Ex. 234.

L. R. 26 I. A. 97.

Much reliance has been placed by the respondent upon the cases of *Satyesh Chunder Sircar v. Dhunpul Singh* (1) and *Beni Madhub Goraini v. Lal Moti Dassi* (2). In the first case the defendant in a suit to recover arrears of rent pleaded that he was entitled to a reduction of the rent on the basis of an unregistered agreement with the plaintiff. This agreement, however, was admitted in the plaint in a previous suit against the same defendant. The learned Judges held that as the agreement was proved by the written admission of the plaintiff, it was not necessary for the defendant to use the unregistered agreement in support of his case; but they clearly intimated that if the defendants' plea had rested solely on this unregistered agreement it would have failed, the document being inadmissible for want of registration.

In the second case, oral evidence was held to be admissible, not for the purpose of varying the rents specified in the *kabuliat*, but for the purpose of showing that the agreement embodied in the *kabuliat* was never intended to be acted upon or enforced. That is wholly different from what is sought to be done here.

On the second point, I am of opinion that the agreement for reduction of rent is not enforceable, inasmuch as it was made without consideration. The defendant No. 1 admits in his depositions in the present suit, as well as in the previous suit, that the plaintiff's predecessor in title granted the reduction of rent out of favour. The mere fact that rent for the years 1305 and 1306 has been received at the reduced rate does not bind the plaintiff to accept rent at that rate in future. The transaction amounts to no more than an indulgence on the part of the lessor, which might be put an end to at any time: see *Crowley v. Vitty* (3), *Fitzgerald v. Lord Portarlington* (4), where rent at the reduced rate had been reduced for three years, and yet the agreement was held not binding as being wholly without consideration: *Morgan v. Rainsford* (5), *Radha Raman Chowdry v. Bhowani Prasad Bhowmik* (6).

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(1) (1896) I. L. R. 24 Calc. 20.

(2) (1898) 6 C. W. N. 242.

(3) (1852) 7 Ex. 319; 86 R. R. 664

(4) (1835) 1 Jones (Irish) 431.

(5) (1845) 8 Irish Eq. 299.

(6) (1901) 6 C. W. N. 60.

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With regard to the liability of the defendants to pay the cesses, I am unable to agree with the Court below. In the lease the defendants expressly covenanted to pay, besides the fixed rental, the road and public works cesses and other taxes and cesses payable by them. Consequently, they are bound to pay the cesses to the plaintiff, unless they can show that they have already paid them to the Collector. They have adduced no evidence whatever in support of their bare statement. The Court below is not right in assuming that they are paying the cesses to the Collector.

The question as to whether there was proper tender or not of the rents for the years in suit cannot properly be determined until the claim of the defendants for an abatement of the annual rent on the ground of diminished area is decided. This, however, forms the subject-matter of the other appeal to which I must now turn.

The questions involved in this appeal are, *first*, what is the true extent of the subject-matter of the demise created by the *mokurari-maurasi kabuliat*, dated the 3rd December 1894; *secondly*, if the answer to this question be in favour of the defendants, whether they are entitled to an abatement of rent.

Upon the first question, the contention of the defendants is that they are entitled to the coal underneath the full quantity of 400 *bighas* of land specified in the lease. The contention of the plaintiff, on the other hand, is that the defendants are entitled to the coal underneath such quantity of land only as is contained within the boundaries described in the schedule to the lease.

The solution of this controversy between the parties depends on the true construction of the words of the *kabuliat*. The material words of that document are as follows :—“ I having applied to get from you a settlement of the rights of cutting, raising and selling, etc., the coal underneath the 400 *bighas* of land described in the Schedule below within Mouza Dobari, Pergunnah Jherria, recorded in Towji No. 8 of the Collectorate of the District Manbhum, and which is within the zemindari owned and possessed by you in ancestral right, and you having

granted my application, I hereby execute in your favour a *mokurari* permanent *maurasi kabuliat* for 400 *bighas* of land as per boundary below within the said Mouza, and which, (that is, the said 400 *bighas*) after having been marked out by you, I shall enclose by putting up masonry pillars at my own cost, in consideration of your taking from me Rs. 8,400 as *salami* and fixing an annual *mokurari* rental of Rs. 2,800 for the rights in coal under the said 400 *bighas* of land; and I agree that year after year and according to the instalments I shall pay to you into your zemindari cutchery every year in three instalments a fixed rental, and also the road and public work cesses and other taxes and cesses payable by me according to law that may be imposed in future by Government, namely, in Sraban of each year Rs. 900 and in Chaitra Rs. 1,000 out of the rental fixed; and after taking *dakhilas* for the same, according to the usage in vogue in your *serishta*, I shall thereupon enjoy and continue to enjoy from generation to generation all the rights in the coal under the 400 *bighas* by cutting, raising and selling the same after making the said coal fit for the market, and vested with the power of gift, sale and all kinds of assignments of the same according to pleasure. The rental fixed shall never, on any account, be varied. I shall surround the boundaries of the settled lands by erecting masonry pillars, which I shall keep in regular repairs at my cost." The schedule of the boundaries is thus stated—"on the south, boundary line of Mouza Fatehpur as per thak; on the west, boundary line of Mouza Jheria Khas as per thak; on the east, border of the 100 *bighas* of land settled with Gopal Krishna Roy and others and the Chutkari Jore (streamlet); on the north, boundary line of Mouza Bherakata as per thak and the Chutkari Jore (streamlet)."

"Right in the coal underneath the 400 *bighas* of land within these boundaries." The *kabuliat* also recites that it is executed on receipt of a corresponding *patta* from the lessor. This *patta*, however, has not been produced and nothing turns upon it.

It is admitted on behalf of the plaintiff that the lease in respect of the 100 *bighas* of land in favour of Gopal Krishna

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Roy and others, the border of which land was mentioned as forming part of the eastern boundary of the demised land was, as a matter of fact, not executed until some time afterwards. In the year 1895 an officer of the plaintiff demarcated on his behalf on the spot an area as being the 400 *bighas* purported to be demised under the lease, and it was thereupon enclosed by the defendants by pillars; but this area, as will be seen later, was on actual measurement held in September 1902 found to consist of 346 *bighas* 4 *cottahs* 4 *chittaks*. On the 26th April 1902 the plaintiff brought a suit, being No. 41 of 1902, in the Court of the Subordinate Judge of Manbhum against the present defendants for a declaration that the latter had overstepped the western boundary line mentioned in their lease, and were in wrongful possession by cutting coal underneath the lands comprised within the boundaries specified in the third schedule of the plaint in that suit, and for a perpetual injunction restraining them from cutting and raising coal from the disputed land and also for substantial damages. The area of the disputed land was found by the Civil Court Amin to be 50 *bighas* 18 *cottahs*. The ground upon which the plaintiff asserted that the defendants had transgressed the boundary line was that the boundaries of the land demised to the defendants on the north, west and the south were the boundary lines of the border mouzas according to the respective survey maps, and not according to the thak maps of those mouzas.

Both the Court of first instance and this Court on appeal held that, upon the proper construction of the description of the boundaries in the lease, the contention of the plaintiff was untenable, and that the boundaries on the north, west and south were the boundaries of the border mouzas according to the thak maps of those mouzas. The result of that decision was that the defendants were held to have unlawfully dug out coal from underneath 1,600 square feet of land situated outside the thak boundary on the west; but under the decree made in that suit they were simply restrained by an injunction from overstepping the thak boundary line, and the rest of the plaintiff's claim was dismissed.

A Civil Court Amin was appointed in that suit to measure the lands then in dispute, and to relay on the spot the survey and thak maps of mouza Dobari, the mouza situated on the west of the demised land. He showed in his map the respective position of the thak and survey lines of that mouza. The defendants pointed out to him the situation and extent of the land of which they had obtained possession in 1895 according to the demarcation made by the plaintiff's officer. The position of this land was also delineated in his map, and its extent was found to be 346 *bighas* 4 *cottahs*. The western limit of this land, which was pointed out by the defendants as being then in their possession, is considerably to the west of the eastern thak boundary line of mouza Dobari, and similarly the northern limit of the lands then pointed out to the Amin is much further to the north of the northern thak boundary line of mouza Dobari.

It is evident, therefore, that in consequence of the decision in the last-mentioned suit the area of the land now in the possession of the defendants is much less than 346 *bighas* 4 *cottahs*. I find myself unable to agree with the learned Subordinate Judge that the defendants are in possession of 346 *bighas* 4 *cottahs*. True, there are doubtless certain passages in the judgments of the Court of first instance and this Court which may lead to that inference; but I think these passages proceeded upon a misapprehension of the report and the map of the Civil Court Amin. The precise area of which the defendants were then in possession was not at all the subject of consideration in that case. The Civil Court Amin who measured the land in the previous suit has been examined by the defendants in the present suit. He proves that the area of the land within the boundaries, finally determined in the previous suit as the boundaries of the demised premises, is 275 *bighas* 3 *cottahs* 10 *chittaks*. The plaintiff has adduced no counter-evidence on this point.

Consequently the result is that the quantity specifically stated in the lease is 400 *bighas*, whereas the area contained within the boundaries mentioned therein is 275 *bighas* odd only.

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Returning now to the question of the true construction of the subject-matter of this lease, the primary canon of interpretation of a deed or grant, where there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity, unquestionably, is that the description of the boundaries, if it is precise and accurate, dominates the description of the quantity: see *Llewellyn v. Earl of Jersey* (1), *Jack v. M'Intyre* (2), *Cowen v. Truefitt, Ltd.* (3), *McIver v. Walker* (4). On the other hand there is a supplementary canon equally well established, though instances of its application are much less frequent than those of the other, that if the description of the boundaries is vague and uncertain, it yields to the description of the quantity: see *Herrick v. Sixby* (5), *Davis v. Sheperd* (6), *Mellor v. Walmesley* (7), *Horne v. Struben* (8), *Newsom v. Pryor's Lessee* (9) and *Ainsa v. U. S.* (10).

These two canons are in fact illustrations of, and may be summed up in, a more general principle that where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter: *Newsom v. Pryor's Lessee* (9). This, again, is not a rule of law and hence inflexible in its character, but a mere rule of construction, which serves as a safe and almost infallible guide in determining the intention of the parties, which is the touchstone of true interpretation. Indeed, it is all-controlling and predominates over all the elements of description of the subject-matter.

The present case, when carefully analysed, presents features so peculiar that neither of the two canons I have just indicated enable us to solve the difficulty. Here the two elements—the boundaries and the quantity—are equally certain and

(1) (1843) 11 M. & W. 183;
 63 R. R. 569.

(2) (1845) 12 Cl. & Fin. 151.

(3) [1898] 2 Ch. 551; [1899] 2 Ch. 309.

(4) (1819) 4 Wheaton U. S. 444.

(5) (1867) L. R. 1 P. C. 436.

(6) (1866) L. R. 1 Ch. App. 410.

(7) [1905] 2 Ch. 164.

(8) [1902] A. C. 454.

(9) (1822) 7 Wheat. U. S. 7.

(10) (1895) 161 U. S. 208, 229.

exactly defined. The boundaries are as precise and definite as the quantity is specific and exact. But there is a gross divergence between the quantity specified and the quantity found to be included within the defined boundaries. In a case of this kind, preference ought to be given to that element of the description of the subject-matter which is most consistent with the intentions of the parties, to be collected from the other parts of the deed, illuminated, if necessary, by the surrounding circumstances and the subsequent conduct of the parties : see *Lord v. Commissioners for City of Sydney* (1), *White v. Luning* (2), *Crogham v. Nelson* (3), *Holmes v. Trout* (4). We have, therefore, to ascertain upon a proper and reasonable construction of the language of the lease, what the dominant idea and real intention of the parties was in regard to the extent of its subject-matter. It is quite clear that, so far as the situation of the land demised is concerned, apart from any question as to its true extent, it is land situated in mouza Dobari and within the thak boundaries of that mouza, because the description of the boundaries shows that it is circumscribed on three sides by the thak boundaries of the border mouzas, and on one side by a physical boundary, which again is situated inside that mouza. It is equally clear that the demise, *primâ facie*, is of the coal underneath the 400 *bighas* of land, which 400 *bighas* are described in the schedule appended to the lease, and not of the coal underneath the lands described in that schedule, followed by an approximate statement of the area contained therein. This is merely an element to be taken into consideration in construing the lease and is by no means conclusive. Then follows a very important clause, and that is, that the situation of the 400 *bighas* is to be marked out by the lessor on the ground, and it is to be then enclosed by the lessee by means of masonry pillars erected at his own expense. It is manifest, therefore, that the lessor reserved to himself the right of marking out the 400 *bighas* demised under the lease, and that it was after such demarcation, and not until then, that

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(1) (1859) 12 Moo. P. C. 473, 496.

(3) (1845) 3 How. U. S. 187.

(2) (1876) 93 U. S. 514.

(4) (1833) 7 Pet. U. S. 171.

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the lessee was to go into possession of the land. This clause negatives the idea that the lessee was to find out for himself the land within the boundaries defined in the schedule and take possession of such land, and necessarily points to the inference that the description of the boundaries was a subordinate element in the estimation of the parties. The rent reserved is Rs. 2,800, which is exactly seven times the number of *bighas* mentioned in the lease, *i.e.*, at the rate of Rs. 7 a *bigha*, and the *salami* or premium is Rs. 8,400, which is exactly 21 times the same number of *bighas*, *i.e.*, at the rate of Rs. 21 per *bigha*. That the rental was to be fixed at the rate of Rs. 7 per *bigha* per annum, and the premium at three times that rate, is corroborated by the language of the receipt executed on the 14th Agrahayan 1301, corresponding to the 29th November 1894, that is, four days before the date of execution of the lease by the plaintiff's predecessor in favour of the defendant No. 1, whereby the former acknowledged receipt of a sum of Rs. 7,000 as payment in advance on account of premium. A statement contained in a contemporaneous document undoubtedly furnishes a legitimate aid to construction: see the observations of Sir George Jessel, M. R., in *Smith v. Chadwick* (1) and *Anderson's case* (2). The case of *Leggott v. Barrett* (3) does not touch the point.

The next clause which has an important bearing upon the construction of this lease is the one which provides that the rental so fixed "shall never on any account be varied." If the intention of the parties was that the coal below the land comprised within the specified boundaries should be demised, the exact area whereof was at the time indeterminate, and hence unknown to both parties, it is only reasonable to expect that they would, for the purpose of safeguarding their respective interests, take particular care to insert in the lease a clause to the effect that, in case the area included within the boundaries be found on actual measurement to exceed 400 *bighas*, the lessee would be liable to pay an increased rental in proportion to the increased area, and conversely in case the area be found on actual measurement to be less, there would be a corresponding

(1) (1882) 20 Ch. D. 27, 62, 63.

(2) (1877) 7 Ch. D. 75, 99.

(3) (1880) 15 Ch. D. 306.

reduction in the rental. And it is for this reason that a clause of this sort is so generally common in perpetual leases in this country whenever the land demised is included within definite boundaries, but the rental is fixed on some approximate area ascertained by guess and is calculated at a certain rate per *bigha*. The absence of such a clause, and the fixity of the rent in perpetuity, raises a strong inference that the area demised was the specific quantity of 400 *bighas*, and not any undefined area unknown to the parties at the time of the lease. The following clause towards the end of the document, namely :—" You are not liable to me for the return of the above amount of *salami* (premium), or for any other matter, " also tends in the same direction.

Having regard generally to the whole tenor of the lease, and the above-mentioned clauses in particular, it is difficult to resist the conclusion that the parties were dealing with something clear, definite and certain, and regulating their rights on that basis, and not on the basis of an uncertain, variable element such as the area, even if included within definite boundaries, would necessarily be.

Moreover, the wording of the prayer and of the schedule of boundaries in the plaint filed by the plaintiff in the previous suit No. 41 of 1902 also leads to the same conclusion.

This brings me to the consideration of the second question, namely, whether, if the first question be decided in favour of the defendants, they are entitled to reduction of rent in proportion to the area now in their possession. Now, though there is no express covenant to that effect in the lease, nevertheless the parties having adjusted the annual rental on the basis of the specific area of 400 *bighas*, and the plaintiff having failed to put the defendants in possession of that specific area, I am of opinion that the defendants are entitled to a proportionate reduction of rent. I have already stated in dealing with the first question that the plaintiff expressly assumed the obligation of marking out the position of the 400 *bighas* as a condition precedent to the entry of the defendants on the land. This obligation, coupled with the adjustment of the rent on the basis

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of the specific area, necessarily implies an undertaking on the part of the plaintiff that, in case he fails to place the defendants in possession of the entire quantity of 400 *bighas*, he shall have no right to claim the full rent, but only such rent as may be chargeable for the area over which he may be able to put the defendants in possession.

The essential facts in the case of *Imambandi Begum v. Kamleswari Pershad* (1) are somewhat similar to the facts of the present case, and the decision of their Lordships of the Privy Council in that case seems to me to be conclusive on the present question. In that case, both the lessors and the lessee *bonâ fide* believed that the lessors had a much larger share than they really owned. The demised share formed part of a larger share, in respect of which a separate account had been opened in the Collector's register. This latter share was soon after sold for arrears of revenue payable in respect of it. The lessee brought a suit against the purchaser at the revenue sale for possession of the share in respect of which he had taken a *mokurari* lease. The lessee ultimately succeeded in taking possession, though of a much smaller share. He then sued the purchaser at the revenue sale, who stood in the shoes of his lessors, for mesne profits. The purchaser pleaded that he was entitled to set off the full rent payable under the *mokurari* lease. Their Lordships of the Privy Council held that "though this was not a case of eviction of the lessee by the lessor, for the lessee had not been put in possession by his lessors, yet the lessee was in a similar position to having been evicted from that part, and there is the same equity for apportionment as in a case of eviction." The true legal theory on which this equity rests is fully expounded in the leading case of *Paget v. Marshall* (2). In that case there was fundamental error as to the identity of the subject-matter of the lease on the part of the lessee, if not on the part of the lessor too. Bacon V. C., held that this error prevented the formation of a true contract, but gave the lessee the option to affirm the lease as had been really intended to be offered by the lessor, and further held that the lessee was entitled under similar

(1) (1894) I. L. R. 21 Calc. 1095.

(2) (1884) 28 Ch. D. 255.

circumstances, if not in that particular case, to a proportionate reduction of rent for the diminution in the area of the subject-matter of the lease. In the cases of *Harris v. Pepperell* (1), and *Garrard v. Frankel* (2), the lessee, defendant, was allowed the option of accepting a rectification of the lease in lieu of rescission. The present case is much stronger, inasmuch as there was fundamental error on the part of both the lessor and the lessee as to the *existence* of the subject-matter of the lease. Both of them thought that there existed 400 *bighas* plus 100 *bighas* to be leased to Gopal Krishna Roy within the specifically defined boundaries. As a matter of fact, however, there was a much less area within those boundaries. This fundamental error prevented the formation of a valid contract, but the parties are relegated to the original position as if the original offer was still open; and the defendant has the option to affirm the original transaction with a proportionate abatement of rent.

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As in my opinion the defendant is entitled to abatement of rent, it follows, from what I have said before, that the question of tender does not arise, and that consequently the plaintiff is not entitled to claim interest.

The result is that the appeal of the plaintiff, appeal No. 291 of 1907, partially succeeds, *i.e.*, in so far only as regards the claim for rent at the rate of Rs. 7 per *bigha*, and that for road cess and public works cess; *quoad ultra*, the appeal fails.

The appeal of the defendant, appeal No. 318 of 1907, also partially succeeds, *i.e.*, in so far as regards the claim for abatement of rent and non-liability for interest.

The decree of the Court below will be modified in accordance with the foregoing observations. Each party will bear his own costs both in this Court and the Court below.

RICHARDSON J. In regard to appeal No. 291, I concur in the opinion of my learned brother.

As to appeal No. 318, in which the defendants are the appellants, it has now been found that the contract between the parties is contained in the lease dated the 3rd December

(1) (1867) 5 Eq. 1.

(2) (1862) 30 Beav. 445.

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1894, and the controversy turns on the true construction of that document, a question of some difficulty. The lease appears to be a demise of land within specified boundaries. The parties thought that the area comprised within those boundaries was 400 *bighas*. It turns out apparently to be a little more than 275 *bighas*. If there were nothing more than this, the defendants would have to pay the rent reserved, notwithstanding the difference between the estimated area and the actual area. There is no mistake in the sense that the parties have said in the lease something which they did not at the time intend to say. The mistake or misapprehension related to the subject-matter of the lease, and if the parties were merely dealing with an estimated area, it would be proper to suppose that they took the risk of the area turning out greater or smaller. But the question does not rest there. There can be no doubt that the *salami* was calculated at the rate of Rs. 21 a *bigha* and the rent at the rate of Rs. 7 a *bigha*. Moreover, the lessor covenanted to point out the 400 *bighas* within the specified boundaries. I thought at first that the *salami* and rent might be considered to be calculated at the rate stated per estimated *bigha*, and that the covenant to point out the 400 *bighas* should be construed as a covenant to point out the area estimated to comprise 400 *bighas*. On further consideration, however, I have come, not without hesitation, to the conclusion that the lease is capable of a construction more favourable to the defendants, and that the lessor promised to point out an actual area of 400 *bighas* within the boundaries specified. In this, of course, he has failed, it being physically impossible for him to do what he promised. The result appears to be that the defendants are entitled in defence to plead that the plaintiffs have not carried out the whole of their part of the contract and to claim, as a matter of legal right, compensation on that ground. In that view, although I have not much sympathy with the defendants, who have behaved throughout in a most unbusiness-like way, I agree in the orders which my learned brother proposes to make.

Appeals allowed in part.

APPELLATE CRIMINAL.

Before Mr. Justice Brett and Mr. Justice Chitty.

ELEM MOLLA

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Murder—Violent and determined attack by a number of persons, regardless of the consequences, on another causing other injuries and severe ruptures of a healthy spleen—Intent to cause death or such bodily injury as the offender knows to be likely to cause death—Penal Code (Act XLV of 1860 ss. 300 (1) (2) and 302.

A body of six persons attacked another with cattle goads in a violent and determined manner, inflicting sixteen wounds on his body and causing several and severe ruptures of his spleen, and so caused his death. The person attacked was a strongly built man of 35 years of age, and his spleen was in a healthy state :—

Held, that such acts, committed by several persons on one, in such a manner, apparently regardless of the consequences, and with such results, warranted the inference that the acts were done by those persons with the intention either of causing the death of the person attacked or such injuries as the offenders knew to be likely to cause his death : and that the offence amounted to murder.

The two appellants, Elem Mollah and Juran Sheik, together with one Aminuddi Molla, were tried before the Sessions Judge of Faridpur with the aid of Assessors, charged with the murder of Nowai Khan under section 302 of the Penal Code. The Assessors found them not guilty, but the Judge, disagreeing with them, convicted the appellants of murder and sentenced them to transportation for life, and acquitted Aminuddi.

The accused were members of a party that had a long-standing feud with Nowai Khan, the deceased, and his party. There was litigation between them for the past two years, and it appeared that a criminal case was pending at the time of the occurrence. On the 9th March 1907, Nowai Khan went to the Dignagar *hat* in a neighbouring village, about midday, and was returning home when he was waylaid by the two accused and

*Criminal Appeal No. 527 of 1907, against the order of J. F. Graham (Offg. Sessions Judge of Faridpur, dated May 28, 1907.

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others and severely assaulted in a field with cattle goads. He was carried home and water and oil were applied to his wounds. The police and panchayet were sent for, but before the arrival of the former he died. The medical officer, on holding a *post-mortem* examination, found 16 wounds of various descriptions on the body of the deceased, a strongly built man of about 35 years of age. The spleen, which was in a healthy condition, was severely ruptured in several places and nearly torn through at one place.

Mr. B. M. Chatterjee and Babu Manmatha Nath Mookerjee,
for the appellants.

The Deputy Legal Remembrancer (Mr. Douglas White), for
the Crown.

BRETT AND CHITTY, JJ. The two accused were placed on their trial before the Sessions Judge of Faridpur, charged, under section 302 of the Indian Penal Code, with having committed murder by causing the death of one Nowai Khan. The two Assessors were of opinion that the guilt of the accused was not established by the evidence adduced. The Sessions Judge, however, disagreeing with the opinion of the Assessors, has found that the charge has been fully proved against them both, and has convicted and sentenced them to transportation for life.

Both the accused have appealed. The case against them was that they, with members of their party, had a long-standing feud with Nowai Khan and members of his party; that litigation had been going on between them for the past two years and that a criminal case was pending on the 9th March 1907. On that date the deceased, Nowai Khan, went to the Dignagar *hat*, which was in a neighbouring village, apparently about midday, and was returning home a little after dusk. While returning, he is said to have been waylaid by the two accused and some other persons, and to have been so severely beaten that he died from the effects.

The case for the prosecution is that the two witnesses, Nowai Sheik and Adiluddi, were returning home from the

Dignagar *hât* just after night-fall on the 9th March, and when they reached a field, called Bhatpara field, they saw a man running towards them down the pathway, that as he came near them he left the pathway for the ploughed fields and then fell. They recognized the man to be the accused Juran Sheik. They asked him what he was doing there, but he gave no answer and ran away. They also saw the forms of other men running away. A few yards further on the road they came across the deceased, Nowai Khan, lying in a wounded state. They questioned him as to who were his assailants, but he asked them to bring water. After water had been brought from a house close by, he informed them that Aminuddi, Juran, and Surah, had attacked him and wounded him in the manner in which they found him.

Kasimuddi, prosecution witness No. 8, appears to have been following these two men from the *hât*, and he says that, as he arrived near the spot where Nowai Khan was discovered, he saw a man run past him and he recognised him to be the accused Elem Mollah. Another man, named Mea Jan, who arrived there afterwards, says that he saw a man run past him and that he recognized him to be Aminuddi Mollah. This man, Aminuddi, was placed on his trial with these two appellants, but the evidence against him was considered insufficient and he was acquitted.

Information was sent to Nowai Khan's brother, Abdul Khan, and assistance having arrived, Nowai was carried to his house. After he arrived there water and oil were applied to his wounds, and the panchayet was sent for. The panchayet, after his arrival, questioned the deceased as to the manner in which he had received his injuries, and asked the names of the persons who had wounded him. Nowai then made a statement, which the panchayet recorded in writing, to the effect that he had been attacked and beaten by six persons, two of whom were the two present accused.

Information was sent to the police, but before the arrival of the police Nowai Khan died. His body was sent to Faridpur for *post-mortem* examination, and the result of that

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examination was to prove that death was the result of extensive ruptures of the spleen. The medical officer in his evidence has stated that he found no less than 16 wounds of various descriptions on the body of the deceased, who was a strongly built Mahomedan of about 35 years of age, and that the spleen was very severely ruptured in several places, and in one place was nearly torn through. The medical evidence leaves, in our opinion, no doubt that Nowai Khan met with his death from violence used towards him by persons other than himself, and that the persons who inflicted those injuries must have inflicted them either with the intention of causing his death, or with the knowledge that such injuries would cause death, or regardless of the consequences of the injuries which they might cause.

The accused Juran was arrested shortly after the occurrence, and Elem was arrested the next day. They were sent to Faridpur, and both of them made statements admitting that they took part with the other men in the attack which was made on Nowai Khan, and which resulted in his death. These statements were withdrawn before the committing Magistrate, but at that time the two accused merely denied that the statements had ever been made. Before the Sessions Court, however, they told a different story, alleging that the confessions had been extorted from them by ill-treatment on the part of the police. The learned Sessions Judge has come to the conclusion that these confessions were voluntarily made and that they are entitled to reliance. He has pointed out that no allegation of ill-treatment was made before the Magistrate, and that the story of torture by the police was apparently an afterthought in the Sessions Court. He has, therefore, treated these confessions as being entitled to reliance, supported as they are by the other evidence in the case.

The other evidence against them consists of the statements made by Nunai Sheik, Mohajudi Sheik, and Adiluddi Sheik. Their depositions are to the effect that just before they reached the spot where Nowai Khan was found they saw the two accused running away from the spot; that when called to they

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gave no answers, but continued their flight. There is further the evidence of the witnesses Kasimuddi, Ansuruddi, and Mea Jan, as well as the evidence of the three witnesses already named, who say that immediately after the occurrence the deceased, when asked who the persons were who had attacked and beaten him, named the two accused and some others. There is, besides, the evidence of the panchayet and the statement of the accused recorded by him, supported by the evidence of two witnesses who were present when the statement was recorded. In that statement the deceased clearly named the two accused as having been concerned with others in the attack on him which resulted in his death.

One of the Assessors has declined to believe the evidence of the panchayet and of the persons who testified to the fact that the statement as recorded was made by the deceased before his death, on the ground that the medical evidence shows that the deceased could not have survived long enough to make any such statement. There is, however, the evidence of these three witnesses, as well as of other persons, to prove that the statement was made, and the medical evidence cannot, in our opinion, be taken to go so far as to render it impossible that the statement could have been made. The time during which the deceased may have lived after the infliction of the injuries as given by the medical officer was only approximate, as it would depend to a certain extent on whether the hæmorrhage from the internal organs was rapid or not. We are unable to agree with this Assessor that the medical evidence was such as to render it impossible that the statement could have been made by the deceased to the panchayet.

The other Assessor was of opinion that the case for the prosecution could not be believed, because, in the first information which was given to the police by the brother of the deceased, no mention was made of the dying declaration. The evidence, however, goes to show that the first informant left before the statement was recorded by the panchayet, and the statement appears to have been handed over to the Sub-Inspector of police by the panchayet as soon as he arrived on the spot.

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The learned Sessions Judge, after taking into consideration the confessions of the accused, the evidence of the witnesses, and the statements of the deceased, has come to the conclusion that the two accused were two of the persons who attacked the deceased and inflicted on him the injuries which resulted in his death. The whole of the evidence has been read to us and, in our opinion, it fully supports the conclusion at which the Sessions Judge has arrived, and we agree with his conclusion.

The learned counsel, who has appeared for the defence, has argued that the witnesses who have been examined are some of them men who were not mentioned in the dying declaration or in the first information report, whereas witnesses who are mentioned in those documents have not been examined.

It appears, however, that a number of persons was present at the time when the statement was recorded and when the first informant left to go to the police. It is not improbable that, in consequence, in both of these documents persons were named who had not actually witnessed the occurrence, or that others who were able to give evidence connecting the accused with the crime were omitted.

We do not think that the fact on which the learned counsel relies is sufficient to prove that the whole of the evidence adduced in the case against the accused is not true. Witnesses have been called to prove the existence of the enmity between the two parties in the village, to one of which the deceased belonged and to the other the accused, and the learned counsel does not deny that such enmity existed. He has, however, contended that the existence of that enmity would be as much a reason for the fabrication of a false charge against the accused, as for the accused and the men of his party to waylay the deceased for the purpose of beating him so as to cause his death.

After a careful consideration of the evidence adduced in the case, we are, however, of opinion that it fully supports the conclusions at which the learned Sessions Judge has arrived, that the enmity previously existing between the two parties in the village was a sufficient motive for the attack which was made on the deceased, Nowai Khan.

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The learned counsel for the appellants has suggested that his clients had no intention, even if they were concerned in the attack, of doing anything more than to give Nowai Khan a severe beating, and that they had no intention of causing his death. The attack which was made on him appears, however, to have been of a violent and determined character, and the fact that no less than 16 wounds were found on his body, and that his spleen, which appears to have been in a healthy condition, was severely ruptured in several places by the injuries inflicted on him, leaves no doubt that the persons who attacked him either intended to cause his death, or that they attacked him in such a brutal manner, regardless of the consequences, well-knowing that they would be likely to cause his death.

We think that the Sessions Judge is right in holding that the offence committed by the two present accused amounted to murder, and in passing on them the sentences which he has inflicted. We, therefore, confirm the conviction and sentences and dismiss the appeal.

Appeal dismissed.

F. H. M

CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

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Jan. 11.

PRADYOTE KUMAR TAGORE

v.

GOPI KRISHNA MANDAL.*

Incumbrance—Putni tenure—Customary right to cut and appropriate trees, whether an incumbrance—Putni Regulation (VIII of 1819) s. 11—Right of an auction-purchaser at a sale held under the Putni Regulation to avoid such incumbrance—Bonâ fide engagement made by the defaulting proprietor with resident and hereditary cultivators, effect of.

A customary right to cut and appropriate trees is an incumbrance within the meaning of s. 11 of Regulation VIII of 1819.

A purchaser of a *putni taluq* at a sale held under Regulation VIII of 1819 is not entitled to hold the property free from a customary right or a right recognised by usage which has grown up during the subsistence of the *putni*, and under which occupancy raiyats are entitled to appropriate and convert to their own use such trees as they have the right to cut down, inasmuch as he is not entitled to cancel a *bonâ fide* engagement made by the defaulting proprietor with the resident and hereditary cultivators.

RULES granted to the petitioner, Maharaja Sir Pradyote Kumar Tagore.

The petitioner, a purchaser of a *putni taluq* at a sale held under Regulation VIII of 1819, brought four suits against the defendant tenants, which were tried together, for recovery of damages for cutting and appropriating several palm trees that stood on their *jotes*. The defendants denied the plaintiff's claim, and contended that they had a right to cut and appropriate the trees by custom. The learned Munsif, exercising the powers of a Small Cause Court Judge, dismissed the plaintiff's suit.

Against this decision the plaintiff obtained the Rule under section 25 of the Provincial Small Cause Courts Act, 1887.

Babu Shîb Chandra Palit, for the petitioner. The burden of proof to appropriate is on the tenants; they have failed to

*Civil Rules No. 2999, etc., of 1909.

discharge it. A custom must be ancient, invariable and certain. The decrees obtained by the plaintiff zemindar against other tenants show that the custom, if any, is not yet certain and invariable, and therefore cannot have the effect as such. Besides, the present plaintiff, the zemindar, having purchased the putni at a sale under Regulation VIII of 1819, is not bound by any custom which has grown when the putni was in existence. The zemindar could not, during the continuance of the putni, interfere and stop the growth. His cause of action begins when the putni comes to an end. Custom of this sort is an incumbrance within the meaning of section 11, clause (i) of the Putni Law : see *Woomesh Chunder Goopto v. Raj Narain Roy* (1), *Khantomoni Dasi v. Bijoy Chand Mahatab* (2), *Karmi Khan v. Brojo Nath Das* (3), and *Nuffer Chandra Pal Chowdhry v. Rajendra Lal Goswami* (4). A zemindar or a purchaser at the putni sale must not be burdened with any liability by which the zemindary is incumbered through the laches of the putni-car.

Babu Ram Chandra Majumdar, for the opposite party. As to the onus, the finding of the lower Court is conclusive, viz., that there is a custom or local usage to the effect that the tenants cut and appropriate trees without the permission of the landlord and without payment : see *Nafar Chandra Pal Chowdhury v. Ram Lal Pal* (5). As to the decrees obtained by the plaintiff in 1907, it appears that one of them was an *ex parte* decree, and the other two obtained by consent ; as such they do not disprove custom.

As to the contention that custom being an incumbrance has been wiped out of existence by the putni sale, my answer is, *firstly*, it is not an incumbrance. The word is not defined in the Putni Law. The word as defined in the Bengal Tenancy Act in section 161 does not obviously include and mean a custom or usage. The kinds of incumbrances which are liable to be cancelled or annulled by the putni sale, are given in section

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(1) (1868) 10 W. R., 15.

(3) (1894) I. L. R. 22 Calc., 244.

(2) (1892) I. L. R. 19 Calc., 787.

(4) (1897) I. L. R. 25 Calc., 167.

(5) (1894) I. L. R. 22 Calc., 742.

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11 of Regulation VIII of 1819. They evidently mean transactions which are acts of parties. A custom or usage can hardly be worked upon as an act of the parties : *vide* paras. 2 and 3 of section 11. It grows in spite of the acts of the parties and becomes an incident of the holdings. It is an incorporeal right which becomes attached to the holdings. Such incorporeal rights are not at all contemplated by section 11. In the case of adverse possession, the lands go out of the possession of the putnidar and are lost to the mehal, and the incoming purchaser becomes entitled to them. In the case of custom or usage, the holdings remain and are not lost to the mehal, the custom or usage only inhering to them. It is analogous to the acquisition of the right of occupancy. The right grows in spite of the acts of parties, and can hardly be looked upon as an incumbrance.

Secondly, even if it is looked upon as an incumbrance, it is protected under clause 3 of section 11 of Regulation VIII. It is a sort of *bonâ fide* engagement made with the tenants by the late incumbent.

Babu Shib Chunder Palit, in reply.

Cur. adv. vult.

MOOKERJEE AND TEUNON, JJ. The substantial question of law which arises in these Rules is one of some novelty and nicety, and relates to the right of the purchaser of a putni taluk at a sale held under Regulation VIII of 1819 to hold the property free from a customary right or right recognised by usage, which has grown up during the subsistence of the putni, and under which occupancy raiyats are entitled to appropriate and convert to their own use such trees as they have the right to cut down. Upon the facts found by the Court below, the tenants defendants have cut down and appropriated several palm trees which stood on their holdings. They resisted the claim of the landlord petitioner for damages, on the ground that they had a customary right not only to cut down, but also to appropriate trees. This they have established by evidence ; but it is contended on behalf of the landlord that as this custom

came into existence and gradually developed after the creation of the putni and during its continuance, and as he has purchased the property at a sale for arrears of rent under Regulation VIII of 1819, he is entitled to hold the property in the condition in which it was before the putni was granted, and he is not bound to recognise any customary rights that may have grown up in the interval. It may be added that the origin of the putni is not known, but the plaintiff appears to have made his purchase about sixteen years before the date of the suit, and he has recently succeeded in obtaining three decrees for damages against three tenants who had cut down and appropriated trees on their holdings; two of these, however, were consent decrees, and the third was obtained *ex parte*. The Court below has, therefore, rightly treated these instances as insufficient to affect the validity and operation of the custom. The question which now demands investigation is, whether this customary right can be successfully asserted by the tenants against the plaintiff. For the solution of this question, it is necessary to examine for a moment the manner of the origin and growth of a customary right of this description.

In the case of *Palakdhari Rai v. Manners* (1), this Court was called upon to consider the nature of the custom or usage by which an occupancy raiyat is entitled to transfer his holding without the consent of his landlord. Reliance was then placed upon a passage from a judgment of the Judicial Committee in *Juggomohun Ghose v. Manick Chund* (2), where their Lordships, in dealing with the case of a mercantile usage, observed as follows: "To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes local law. The usage may still be in the course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." This

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(1) (1895) I. L. R. 23 Calc., 179.

(2) (1859) 7 Moo. I. A., 263, 282

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passage indicates the mode, if not of the origin, at any rate of the growth of a customary right, or right recognised by usage. Substantially the same view has been indicated in other cases of the highest authority. Thus in *Arthur v. Bokenham* (1), Trevor, C.J., points out that customs owe their origin to common consent, and must consequently have been peaceable and acquiesced in, and not disputed at law or otherwise, and observes as follows : "Customs are not to be enlarged beyond the usage, because it is the usage and practice that makes the law in such cases, and not the reason of the thing, for it cannot be said that a custom is founded on reason, though an unreasonable custom is void ; for no reason, even the highest whatsoever, would make a custom or law, and therefore you cannot enlarge such custom by any parity of reasoning, since reason has no part in the making of such custom : " see also Dane's Abridgement, Chapter XXVI, Article 1, Section 3. If, therefore, customs owe their origin to common consent, and because they recommend themselves as expedient to all, by what precise process do they become binding on parties who enter into contractual relations ? As Tilghman, C.J., puts it in *Stultz v. Dickey* (2), "When the custom of a country or of a particular place is established, it may enter into the body of a contract without being inserted ; both parties are supposed to know it and to be bound by it, unless provision to the contrary is made in the contract." To the same effect is the judgment of Baron Parke in *Hutton v. Warren Clerk* (3), where that learned Judge observes as follows : "It has long been settled in commercial transactions that evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent." The same rule has also been applied to contracts in other transactions in life in which known usages have been established and prevailed, and this has been done upon the principle of presumption, that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract

(1) (1708) 11 Modern 148, 161.

(2) (1812) 5 Binn. 285.

(3) (1836) 1 M. & W., 466.

with reference to those known usages": see also *Gibson v. Small* (1), where Baron Parke treats the same principle as applicable to agricultural contracts, and the notes to *Wigglesworth v. Dallison* (2). We start, therefore, with the proposition that agreements founded on consent are the origin of customs; such agreements, though at first matters of option, when they are established as customs, cease to be matters of choice, and acquire an obligatory element or a binding force. When the custom or usage has become developed and has acquired a binding character, it becomes by implication incorporated into transactions, and can no longer be ignored when the rights of the parties thereunder come to be determined. When, therefore, a landlord acquiesces in a certain course of conduct by his tenants, for instance, an appropriation by them of the trees in their holdings, and such acquiescence has led to the growth of a custom or usage which is binding upon him, the position of the parties is the same as if the landlord had expressly granted to them a right to appropriate the trees. The question now arises, whether the grant of such right is an incumbrance, which is inoperative as against the purchaser of the putni taluk, or whether it is a *bonâ fide* engagement with the tenant which is protected by the law.

Now it is well settled that property in trees is by the general law vested in the zemindar. The tenant is entitled to cut down trees, provided there is no local custom to the contrary, but he can appropriate the trees when felled, only if such appropriation is sanctioned by local custom: *Najar Chandra Pal Chowdhuri v. Ram Lal Pal* (3), *Nuffer Chunder Ghose v. Nund Lal Gossyamy* (4), *Sitab Rai v. Dubal Nagesia* (5), *Kausalia v. Gulab Kuar* (6), *Ganga Dei v. Badam* (7), *Ruttonji Eduljee Shet v. Collector of Tanna* (8), *Honywood v. Honynwood* (9); Taylor on Landlord and Tenant, Section 354.

(1) (1853) 4 H. L. C. 353, 397.

(2) (1779) 1 Douglas, 201;
1 Smith L. C., 545.

(3) (1894) I. L. R. 22 Calc. 742.

(4) (1890) I. L. R. 22 Calc., 751.

(5) (1907) 6 C. L. J. 218.

(6) (1899) I. L. R. 21 All., 297.

(7) (1908) I. L. R. 30 All., 134.

(8) (1807) 11 Moo. I. A., 295.

(9) (1874) L. R. 18 Eq., 306.

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When, therefore, tenants who have originally no right to appropriate trees which have been felled, are allowed to do so, and this course of dealing is acquiesced in for a length of time, and in numerous instances so as to ultimately entitle the tenants to a customary right of appropriation, tacitly incorporated into their contracts, the result is a substantial encroachment upon the rights of the landlord. Can such a right be properly described as an incumbrance within the meaning of section 11 of Regulation VIII of 1819? That section does not define the term 'incumbrance,' but provides that, when a putni taluk is sold for arrears of rent, it is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives, or assignees. As instances of incumbrances, we find mentioned in the same section transfers by way of sale, gift or otherwise, mortgages and other limited assignments, and also leases created by the holder of the tenure. A customary right of the description mentioned would not be included in any of these specific illustrations. At the same time it would not be right to treat the instances of incumbrances mentioned in the section as absolutely exhaustive. It becomes necessary, therefore, to examine for a moment the meaning of the term 'incumbrance.' Wharton, in his Law Lexicon, defines an incumbrance as "a claim, lien, or liability attached to property," which definition is adopted by Romer, J., in *Jones v. Barnett* (1). Sweet, in his Law Dictionary, observes that to encumber land is to create a charge or liability, for example by mortgage, and adds that incumbrances include not only mortgages and other voluntary charges, but also liens, *lites pendentes*, registered judgments and writs of execution. In the Oxford Dictionary, an incumbrance is broadly defined as a burden on property, and reference is made to Bacon's Maxims and Uses where he speaks of certain acts as collateral incumbrances. In the Encyclopædia of American and English Law, an incumbrance is defined as a burden upon land depreciative of its value, such as a lien, easement, or servitude which,

(1) [1899] 1 Ch., 611, 620.

though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee. Similar definitions are given in the Law Dictionaries by Abbott and Anderson. Bonvier, in his Law Dictionary, defines an incumbrance as "any right to, or interest in, land which may subsist in a third person to the diminution of the value of the land, and not inconsistent with the passing of the fee in it by a deed of conveyance," which is taken from the decision in *Prescott v. Trueman* (1). In *Memmert v. McKeen* (2), an incumbrance is stated to be a burden or charge on property, a claim or lien on an estate, which may diminish it in value, and incumbrances are then divided into two classes, namely, *first*, such as affect the title to the property; and *secondly*, such as affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former, while a public road or right of way is an illustration of the latter. The definitions which we have quoted above are comprehensive enough to include a right granted to a stranger to cut and appropriate trees, and there is in fact one judicial decision [*Catheart v. Bowman* (3)] where this view has been maintained—a view which has the support of more than one leading text-writer: Tiffany on Real Property, Volume II, 906, and Jones on Real Property, Volume I, 755, and Rawle on Covenants of Title, 98.

It is obvious that if a right granted to another to cut and appropriate trees on land is treated as an incumbrance, a customary right which has precisely the same effect may be comprehended in the term incumbrance. Reference may in this connection be made to the decisions in *Womesh Chunder Goopto v. Raj Narain Roy* (4), *Khantomoni Dasi v. Bijoy Chand Mahatab Bahadur* (5), and *Nuffer Chandra Pal Chowdhry v. Rajendra Lal Goswami* (6), which recognise the doctrine that the title acquired by adverse possession against a putnidar is an incumbrance that has accrued upon the *taluk* by the act of the defaulting proprietor. By way of analogy, it may well be

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(1) (1803) 4 Mass. 627; 3 Am. Dec. 249.

(2) (1886) 112 Pa. 315, 4 Atlantic, 542.

(3) (1847) 5 Barr. 317.

(4) (1868) 10 W. R. 15.

(5) (1892) I. L. R. 19 Calc. 787.

(6) (1897) I. L. R. 25 Calc. 167.

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maintained that a customary right which owes its origin and growth to the acquiescence of the landlord stands on the same footing as a right expressly granted by him ; so that, if a right to cut and appropriate trees expressly conferred on a stranger be treated as an incumbrance, a customary right of that description may very well be included in the same category. We are consequently not prepared, as at present advised, to overrule the contention that a customary right to cut and appropriate trees may be an incumbrance on the property. But we are of opinion that even if this view be maintained, the plaintiff is not entitled to succeed. The third clause of section 11 of the Putni Regulation provides that the purchaser shall not be entitled to cancel a *bonâ fide* engagement made by the defaulting proprietor with resident and hereditary cultivators. The cases have been argued before us on the assumption that the tenants in these cases fall within this description. If the landlord made an engagement with such a tenant that he would be entitled to appropriate the trees in his holding, the purchaser of the putni taluk would, in our opinion, be bound thereby. A customary right in favour of all the tenants, by which they are entitled to appropriate the trees, would be equally operative against the auction-purchaser. It is further obvious that, as pointed out by this Court in *Majoram Ojha v. Raja Nilmoney Singh Deo* (1), the fact that the auction-purchaser is the original zemindar who created the putni does not place him in a better position. We must, therefore, hold that treating an engagement with a stranger by which he is authorised to cut and appropriate trees as an incumbrance imposed upon the land by the owner, treating further a customary right of this description, which owes its origin and growth to the acquiescence of the owner, as included in the category of incumbrances, the creation or growth of such right, whether contractual or customary, must, in the present instance, be regarded as a *bonâ fide* engagement with a resident and hereditary cultivator, which the auction-purchaser at the putni sale is not entitled to abrogate.

(1) (1874) 13 B. L. R. 198 ; 21 W. R. 326.

We desire to add that no arguments were addressed to us upon the question of the possible effect of the doctrine of acquiescence upon the position of the plaintiff who has accepted rent from the tenants for sixteen years after his purchase ; nor was there any discussion at the Bar as to how far the tenants as occupancy raiyats might be protected under the Bengal Tenancy Act. Our judgment, therefore, must not be regarded as a decision upon either of these questions, or as an approval by implication of the principle laid down in *Jogeshwar Mazumdar v. Abed Mahomed Sirkar* (1).

The result is that these Rules must be discharged with costs.

S G.

Rules discharged.

(1) (1896) 3 C. W. N., 13.

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CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

AMBLER

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1910
Jan. 25.

Dispute concerning land—Attachment of subject of dispute—Order of Settlement Court in a proceeding between the same parties and relating to the attached lands—Effect of such order—Release of attachment by Magistrate—Criminal Procedure Code (Act V of 1898), s. 146—Bengal Survey Act (Beng. Act V of 1875), s. 41.

An order of the Survey and Settlement Courts, under the Bengal Survey Act, 1875, section 41, is a determination by a competent Court of the rights of the parties entitled to possession of the land within the meaning of section 146 of the Criminal Procedure Code.

Where the Magistrate attached certain lands under section 146 of the Code, and in a proceeding under section 41 of the Bengal Survey Act, 1875, between the same parties, the same lands were found to be in the possession of the petitioner :—

Held, that the Magistrate was bound to follow such order and to release the lands from attachment.

The petitioner, C. T. Ambler, junior, claimed to hold certain plots of land in mouzas Birozepur and Khudiban as a

*Criminal Revision No. 1453 of 1909, against the order of H. F. Samman, District Magistrate of Monghyr, dated Aug. 31, 1909.

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raiyat. In 1907 a proceeding under section 145 of the Criminal Procedure Code was drawn up by Babu Shama Charan Mitter, Deputy Magistrate of Monghyr, making the petitioner the first party, and the proprietors of the two mouzas and some rival raiyats, the second party. Shah Sami Ahmed, who was one of the second party, was the sole proprietor of Khudiban and joint proprietor of Birozepur. By his order, dated the 14th October 1907, the Deputy Magistrate declared the petitioner to be in possession of 81 bighas of the disputed land and attached the rest, measuring about 129 bighas, under section 146 of the Code.

In a survey and settlement proceeding under the Bengal Survey Act (Bengal Act V of 1875), arising out of a dispute between Shah Sami Ahmed and the other co-owners of mouza Birozepur as to the boundaries of Birozepur and Khudiban, the petitioner being a party thereto, Babu Khetra Mohan Mookerjee, Assistant Superintendent of Survey, found, by his order of the 29th March 1908, that about 100 bighas of the attached lands fell within Birozepur and the rest in Khudiban, but that the petitioner was in possession of the whole of these lands as a tenant. The order was confirmed by Mr. Hubbock, the Senior Assistant Superintendent of Survey, and upheld on appeal by Mr. Murphy, the Superintendent of Survey. On the 16th July the petitioner was, in accordance with the order, recorded as *kaimi* raiyat in the settlement *khatians* of both the mouzas. The portion of the attached lands within Khudiban was further, in a proceeding under section 103A of the Bengal Tenancy Act (VIII of 1885), found by Babu Lakhmi Misser, Assistant Settlement Officer, on the 27th September 1909, to be in the possession of the petitioner as a raiyat under the proprietor of Khudiban.

The petitioner applied to the Joint Magistrate, the officer in charge, for withdrawal of the attachment, and the Magistrate, after notice to all the members of the second party in the original case under section 145, directed by his order, dated the 26th July 1909, the release of the attachment and declared the possession of the petitioner as found by the Survey and

Settlement Courts ; but the District Magistrate, on the 31st August 1909, revoked the Joint Magistrate's order in the following terms :—

The decision in the Survey and Settlement proceedings was under the Survey Act, that is, according to possession, and does not amount to a determination by a competent Court of the rights of the parties to the lands in question. Let the lands remain under attachment.

The petitioner then moved the High Court and obtained the present Rule.

Mr. P. L. Roy (with him *Babu Naresh Chandra Sinha*), for the petitioners. The order of the Survey authorities has, under section 41 of the Bengal Survey Act, 1875, the force of an order of any Civil Court declaring the rights of the parties to the disputed lands and the possession thereof, and the Magistrate was, therefore, bound to release the attachment. Relies also on the proceedings under section 103A of the Bengal Tenancy Act.

STEPHEN AND CARNDUFF, JJ. In this case the land was attached by the Magistrate under section 146 of the Criminal Procedure Code. Subsequently the petitioner obtained an order in his favour from the hands of the Survey authorities under section 41 of the Bengal Survey Act, 1875. He now applies to have the attachment released in his favour, and he is entitled to have it so released, because the order of the Collector as to the land under the Survey Act is a determination by a competent Court of the rights of the person entitled to possession thereof. It is also a determination of the rights of the parties to the original dispute, since the two parties in the original dispute were both before the Survey Court. An order has also been made under the Bengal Tenancy Act, the effect of which we need not notice, as the order under the Survey Act has the force of an order of a Civil Court. The rule, therefore, is made absolute, the order in question is set aside, and the attachment must be released in favour of the petitioner.

Rule absolute.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice. and
Mr. Justice Woodroffe.*

1910
Jan. 26.

KALLYANJEE SHAMJEE

v.

SHORROCK.*

Contract—Construction—“Or 700-800, say seven to eight hundred tons”—Words of description and not of estimation—Warranty—Equitable set-off.

The plaintiff, owner of a stock of coal at Shalimar Depôt, agreed to sell to the defendants “the entire stock at Shalimar Depôt or 700-800, say seven to eight hundred tons of steam coal” for immediate delivery. The entire stock at Shalimar Depôt in fact amounted to 469 tons only, which the plaintiff duly delivered. On a suit by the plaintiff for the price of the coal sold and delivered :—

Held, that the words “or 700-800, say seven to eight hundred tons,” must be construed to be descriptive of the words “entire stock,” and not merely words of estimation; that the delivery of only 469 tons was a breach of the contract by the plaintiff, and that the defendants were entitled to set-off against the plaintiff’s claim the damages caused by such breach.

APPEAL by the plaintiff, Kallyanjee Shamjee, from the judgment of Fletcher, J.

By a contract dated the 20th November 1907, Kallyanjee Shamjee, a coal merchant and owner of a stock of coal at the Shalimar Depôt, agreed to sell to Messrs. George Henderson & Company, of which firm the respondent J. C. Shorrocks was a member, “the entire stock at Shalimar Depôt or 700-800, say seven to eight hundred tons of best Kusunda steam coal freshly raised and free from shales, slates, watermarks, rubble, dust and other impurities at the rate of Rs. 9-8, say nine rupees eight annas, per ton free in boats at Shalimar.” Delivery was to be immediate and payment to be made on completion of delivery. It appears that the entire stock at the Shalimar Depôt amounted to only 469 tons of steam coal. This amount was delivered to Messrs. George Henderson & Company under the contract by the 27th November 1907. On the 28th

*Appeal from Original Civil No. 51 of 1909.

November 1907, Kallyanjee Shamjee presented his bill for Rs. 4,455-8, the price of the 469 tons so delivered.

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Messrs. George Henderson & Company demanded delivery of a further quantity of 231 tons of coal which they claimed to be entitled to under the contract, and on the refusal of the plaintiff to make delivery, on the 28th November 1907 they purchased 231 tons of coal against the contract, and claimed to deduct from the amount of the plaintiff's bill the difference in price which they estimated at Rs. 2,079.

This suit was instituted by the plaintiff for the sum of Rs. 4,455-8 for goods sold and delivered, and in their defence the defendants claimed to set-off the sum of Rs. 2,079 and brought the balance into Court.

On the 30th July 1909, Fletcher, J., dismissed the suit, concluding as follows :—

The real question in the case is as to what was actually sold to the defendant. Did the plaintiff intend to sell a minimum quantity of 700-800 tons, or were the words "say seven to eight hundred tons" merely words of estimation.

Mr. B. C. Mitter has cited many authorities to prove that they were words of estimation only, but those cases apply only to particular contracts. In this case the forms of the bought and sold notes are printed, and in accordance with usual commercial usage, the quantity sold and the rate appear in figures and words, it seems to me therefore to be absurd to say that the word "say" is a mere word of estimation.

I think the words "700-800, say seven to eight hundred tons" merely denote the amount of coal sold in figures and words, and the contract is for the sale of the entire stock or 700-800 tons of coal, and that the parties intended this when the contract was entered into. The plaintiff was the only party who knew the amount of the coal at the depôt at the time. The contract was entered into at a time when there was a strike on the East Indian Railway and the coal was to be in boats at Shalimar. Messrs. George Henderson & Co. stipulated for a minimum amount of 700 tons from the stock at the Shalimar Depôt. The plaintiff therefore having only delivered 469 tons was in default.

As the rate at which the defendants bought the balance of the undelivered coal is not admitted, I refer the question to the Official Referee to enquire and report as to the actual rate. Costs are reserved until the parties have enquired from the Registrar whether notice of deposit of the money in Court was given to the plaintiff. The costs of the reference are specially reserved.

From this judgment the plaintiff appealed.

Mr. B. C. Mitter, for the appellant. The main point in issue is the interpretation of the words in the contract, "the

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entire stock at Shalimar Dépôt or 700-800 tons." The latter words are merely words of estimation. The governing words are "entire stock;" that is an amount which can be ascertained: *Gwillim v. Daniell* (1). It is true that case referred to future goods; but in *McLay & Co. v. Perry & Co.* (2) the goods were in existence. *Leeming v. Snaith* (3) has no application, as the words there were "say not less than": see also Benjamin on Sale, 5th edition, page 701, and Leake on Contracts, 5th edition, page 587. Again, the defendants had no right of set-off, and the breach has not been established.

Mr. Stokes (*Mr. James* with him), for the respondent, was not called upon except as to the date of the breach, which was ultimately agreed to be taken to be the 28th November 1907.

JENKINS, C. J. This is an appeal arising out of a suit brought to recover a sum of Rs. 4,455-8 as the price of 469 tons of coal delivered by the plaintiff to the defendants. The delivery is not disputed. But it is pleaded that there has been a breach of contract on the part of the plaintiff, which entitles the defendants to set-off a sum of Rs. 2,079 by way of damages against the sum of Rs. 4,455-8, and on that footing the defendants submit that he is only entitled to receive a sum of Rs. 2,376-8, and this they offered to pay and have actually brought into Court.

The contract out of which the suit arises is contained in bought and sold notes which, though they are not absolutely in identical terms, may, as Mr. Justice Fletcher says, be taken to be identical for the purpose of the present suit. The sold note on which the plaintiff relies is addressed to Messrs. Banerjee & Co., Managing Agents, Kunji Munji & Company, who may be taken as identical with the plaintiff for the present purpose. It is signed by W. C. Banerjee and runs in these terms:—

"DEAR SIRS,

I have this day sold by your order and for your account to Messrs. George Henderson and Company, Calcutta, the entire stock at Shalimar

(1) (1835) 2 C. M. & R. 61.

(2) (1881) 44 L. T. R. 152.

(3) (1851) 16 Q. B. N. S. 275.

Depôt or 700-800, say seven or eight hundred tons of best Kusunda steam coal freshly raised and free from shales, slates, water-marks, rubble, dust or other impurities at the rate of Rs. 9-8, say nine rupees eight annas, per ton free in boats at Shalimar. The sellers will not be responsible for any demurrage to the boats. Average basket weights. Payment on completion of delivery."

The principal question in dispute between the parties is whether delivery of 469 tons was, in the circumstances of this case, a sufficient performance of the contract. This turns upon the question what force should be attributed to the words "the entire stock at Shalimar Depôt or 700-800, say seven to eight hundred tons of coal." On the part of the plaintiff who, feeling himself aggrieved by the decision of Mr. Justice Fletcher, has appealed from that decision, it is urged that the mention of 700-800 tons is not binding, that it is merely a statement of expectation and nothing more, and not in any sense a warranty, and that he, the plaintiff, has performed his contract in its entirety by delivering 469 tons, that being "the entire stock at Shalimar Depôt." Mr. Justice Fletcher has not accepted that view, and in my opinion rightly. It is not of any great use to refer to decided cases for the purpose of determining the meaning of a contract of this kind. Regard must be had to the actual words used in this case, and to the circumstances under which the parties contracted and to the relative positions of the parties, so far as they are disclosed by the materials before the Court. The position then is this : the owner of this entire stock at Shalimar Depôt being a coal merchant, says that it is in quantity 700-800 tons, while there is nothing to suggest before us that the defendants ever saw the coal, or ever visited the Depôt at Shalimar. At the same time there is no evidence of any custom of trade or usage which would give to the words used any particular meaning in relation to a contract such as this. In the circumstances, I think it is a fair reading of the words to say that there was a promise by the plaintiffs that the coal which constituted their entire stock was 700-800 tons, and that it is impossible to treat the words used as a mere expression of opinion, which was not to carry with it any legal consequences.

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Accepting that view, it necessarily follows that there has been a breach by the plaintiff of his obligation under the agreement between him and the defendants, and though the damages are at present unascertained, and the case therefore does not come within section 111 of the old Civil Procedure Code or the corresponding order of the present Code, still the circumstances are such as to entitle the defendants to rely on this by way of equitable set-off in answer to the plaintiff's claim, so far as it is available for that purpose.

The only other point in the case is whether a breach has been established. It is quite true that there is no oral evidence adduced, but at the same time it is manifest that the parties went to trial on an understanding that the case should be determined, as far as possible, on the pleadings and the correspondence; and reading the pleadings and the correspondence, I think it is established that there was a breach. If there was a breach, it is necessary, for the purpose of determining the damages, to fix the date of that breach, and it has been agreed before us by the parties that the 28th of November 1907 should be taken as that date. The decree as drawn up provides for a reference to the Official Referee to inquire and report what damages were sustained by the defendants by reason of the non-delivery of the portion of the coal contracted to be supplied by the plaintiff as in the pleadings in the suit mentioned.

The measure of damages is the estimated loss in the ordinary course of events arising from the breach of contract: where there is an available market for the goods in question, as apparently is the case here, the measure of damages is *prima facie* the difference between the contract price and the market or current price of the coal on the 28th of November 1907. If, as is said, there was no certain market rate, then evidence must be adduced for the purpose of showing what was the measure of damages.

The result then is that, in my opinion, the decree founded on Mr. Fletcher's judgment is correct, and this appeal should be dismissed with costs.

WOODROFFE J. I agree. To my mind the point seems to be quite clear. Had the plaintiff intended to sell by estimation only, it was open to him to state that fact. The word "say" may perhaps be a word of some ambiguity. It was, however, open to him to state that he sold the entire stock of "about" 700 or 800 tons, or "by estimate" 700 or 800 tons, or "approximately" 700 or 800 tons, using these or other words which would appropriately indicate a sale by estimation. But he sells in fact "the entire stock or 700-800 tons." And then we must look at the circumstances of the case that he was himself a coal dealer, that the goods were not, as in many of the cases cited to us, future goods. The goods were actually in existence at the date of the contract and at the depôt, and I think it must be assumed, in the absence of anything to the contrary, that the goods being in existence, the seller knew what the quantity was which he was selling. In my opinion, therefore, the words "700 or 800" tons were not, as has been contended, a mere collateral estimate of quantity, but an integral part of the contract, that is to say, they were words descriptive of the preceding words "entire stock." It is not likely, in the circumstances of this case, that a stock of existing goods would be sold or bought without a statement of the quantity of the stock sold.

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Appeal dismissed.

J. C.

Attorneys for the appellant : *O. C. Gangooly & Co.*

Attorneys for the respondents : *Orr, Dignam & Co.*

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CRIMINAL REVISION.

Before Mr. Justice Stephen, Mr. Justice Woodroffe and Mr. Justice Chatterjee.

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Feb. 1.

BABBON SHEIK.

v.

EMPEROR.*

Local Inspection—Power of Magistrate to make such inspection during a trial to understand the evidence and to determine the credibility of witnesses—Importing into judgment facts observed on such inspection—Disqualification of Magistrate—Illegality of conviction—Criminal Procedure Code (Act V of 1898), ss. 148, 202, 293, 294, 556, Explanation.

A Magistrate may inspect the place of the occurrence of an offence in cases where he cannot follow or understand the evidence without seeing the features of the land, and he does not, merely by doing so, disqualify himself from trying the case. But every possible precaution should be taken that the inspection is only a view of the local features, and an immediate report of what he has seen should be placed on the record and laid open to the scrutiny of the parties.

The Magistrate can use the testimony of his own senses to test the veracity of the witnesses before him as regards the features of the locality, but he cannot import into the case other matters or facts which he has himself observed.

Where the Magistrate did not merely view the place of occurrence for the purpose of following or understanding the evidence and testing it in respect of the features of the locality, but imported into his judgment matters of opinion and inference based on circumstances not on the record, and did not place thereon the results of his local inspection:

Held, that he had committed an error of jurisdiction which may have materially prejudiced the accused, and that the conviction was, therefore, bad in law.

The Explanation to s. 556 of the Criminal Procedure Code does not directly authorize a Magistrate to make a local inspection, but saves his jurisdiction to try a case, notwithstanding his having made such inspection or investigation, and does not do away with the restrictions under which they should be made,

Girish Chunder Ghose v. Queen-Empress (1), *Hari Kishore Mitra v. Abdul Baki Miah* (2), *Queen-Empress v. Manikam* (3), *In re Lalji* (4), *Satri Dulali v. Empress* (5), *Nidani Mondal v. Alaboza Sirkar* (6), and *Lal Behari Saha v. Bejoy Sankar Sikdar* (7), referred to.

* Criminal Revision No. 1227 of 1909, against the order of W. H. Vincent, Sessions Judge of Alipore, dated Sept. 16, 1909.

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| (1) (1893) I. L. R. 20 Cal. 857. | (4) (1897) I. L. R. 19 All. 302. |
| (2) (1894) I. L. R. 21 Cal. 920. | (5) (1899) 3 C. W. N. 607. |
| (3) (1896) I. L. R. 19 Mad. 263. | (6) (1905) 9 C. W. N. ccxxii. |
| (7) (1905) 10 C. W. N. 181. | |

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The petitioners, Babbon and three others, were tried before Babu D. L. Roy, Deputy Magistrate of Alipore, and convicted, on the 7th September 1909, under section 147 of the Penal Code, and sentenced to three months' rigorous imprisonment each. There was a dispute between the petitioners and complainant's master, Ghisa Mia, regarding the possession of a plot of land measuring five cottahs, adjoining another plot comprising fifteen cottahs on which there stood a *killkhana* or slaughter-house admittedly in the possession of Ghisa Mia. Each party claimed to have obtained it on lease from one Jullur Rahman some years ago and to have been in possession since. The prosecution story was that the 5-cottah plot was taken by Ghisa Mia for the deposit of refuse from the *killkhana*, and that there were five refuse pits on the land in a line which were used in rotation. It was also alleged that at the beginning of May 1909 the complainant's master erected a small hut on the fifteen-cottah plot for the residence of one of his servants. The accused claimed to have been in possession of the disputed plot by the payment of rent, and denied the existence of any refuse pits on such plot. They asserted that the hut was built by them on this land for tethering cattle intended for the slaughter-house. Both parties gave oral evidence of possession and filed documents in proof of their title. After the close of the prosecution and the examination of several defence witnesses, the Magistrate intimated to the parties his intention of holding a local inspection. He went to the place of occurrence accompanied by the parties and their pleaders, and observed the pits and the hut. The result of his inspection was not placed on the record, but the trial proceeded and the remaining defence witnesses were examined. The material portions of his judgment relating to the local inspection were as follows :—

I have held a local inspection of the place in the presence of both parties, and have found that the map filed in this case is generally accurate, except as regards the position of the pits for depositing the entrails of the slaughtered beasts. These pits are not in a line as shown on the map. I found two pits on or about the position shown on the map, and two others on the land to the north of these pits. There can be no doubt that Ghisa Mia has been using these pits, and two of them, at least, are within the 5-cottah plot about which

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there is such a hot contest and in which the hut undoubtedly lies. The tank is admittedly in Ghisa's possession, and the *pucca* road to the *pucca* ghat on the bank lies through this 5-cottah plot as shown in the map; so this is a further proof of Ghisa Mia's possession The overseer's evidence is not the least part of the evidence for the prosecution. He is a thoroughly independent witness, and he corroborated Ghisa Mia's statements regarding the pits. I myself saw that this place could have only been used for throwing refuse on, and not for tethering cattle. The hut is also too small for the purpose of keeping cattle in.

The Sessions Judge on appeal upheld the findings of the Magistrate on the question of possession. His judgment on the point was in the following terms:—

I think that the Magistrate has correctly found that the lands were in the possession of the complainant's party The complainant alleges that on the 5-cottah plot there are a number of pits used for the deposit of refuse from the slaughter-house, and that his master has been in possession of it for some years. There is abundant evidence on the record that there are these pits on the land which are old, and have been used for some time as places in which to deposit refuse from the slaughter-house, and the Magistrate himself saw that at least two of the pits were on the 5-cottah plot, and there is also evidence that Ghisa Mia erected this hut on the land The fact that the pits do exist there, taken with the oral and documentary evidence, proves that the land was really in the possession of Ghisa Mia As to the hut, the Magistrate says that it is too small to be used for cattle I am inclined to think myself that it was built by Ghisa Mia

The Sessions Judge dismissed the appeal by his order dated the 16th September 1909, and the accused thereupon obtained the present Rule from the High Court on the grounds (i) that the trial was illegal and vitiated by the fact that the trying Magistrate held a local inquiry and was influenced by certain things he saw there, and imported his knowledge of such matters into his judgment in disposing of the case; and (ii) that the common object stated in the charge being different from that found by both Courts, the accused ought to have been acquitted.

Mr. Monnier (with him *Mr. Chippendale*), for the petitioner.
The Deputy Legal Remembrancer (Mr. Orr.), for the Crown.

The case was heard before Stephen and Woodroffe JJ., and their Lordships delivered the following dissentient judgments (on 23rd November 1909).

STEPHEN J. In this case a Rule has been granted calling on the District Magistrate to show cause why a conviction of the petitioners of an offence of rioting under section 147 of the Indian Penal Code should not be set aside on two of the grounds mentioned in the petition. The first of these is that the trying Magistrate held a local enquiry and was influenced by certain things he saw there, and imported his knowledge of what he had seen into his judgment in disposing of the case; the second, that the common object stated in the charge was different from that found by both the lower Courts.

The second objection may be very shortly dealt with. The common object charged was by means of criminal force to obtain possession of the *killkhana* lands belonging to one Ghisa Mia. The lands so referred to comprised a fifteen-cottah plot and a five-cottah plot; the offence was found to have been committed to obtain possession of the five-cottah plot only. As the five-cottah plot was included in the *killkhana* lands, we have no hesitation in holding that this fact creates no such variance between the common object alleged and that proved as will invalidate the conviction. As far as this part of the Rule is concerned, it must, therefore, be discharged.

The first ground, however, requires fuller consideration. [The complainant alleged that his master was in possession of the five-cottah plot; the accused contended that one of their number was. In support of his contention, the complainant alleged that the plot in dispute contained five pits which his master used for the disposal of refuse from slaughter-houses he had elsewhere, and also a hut erected for the accommodation of his master's servants. For the defence, it seems that possibly the existence of the pits, and certainly their use as alleged, was denied, and it was alleged that one of the petitioners had erected the hut as a cattle-shed. During the hearing of the case, and apparently after both these points had been made, the trying Magistrate suggested that he had better see the land in question. No objection was made to this, and he accordingly saw the land in the presence of the complainant and the

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accused. There is no doubt that he made use of the impression made on his mind by what he saw in deciding the questions he had to consider.

On behalf of the petitioners it is argued that the course the Magistrate adopted was illegal, and that he had no right to take anything he saw on the land into consideration in adjudicating on the case. The arguments in support of this contention are as follows. Admittedly, there is no provision in the Criminal Procedure Code expressly enabling a Magistrate to view a place connected with a case before him. Sections 148 and 202 of the Criminal Procedure Code seem to be the only sections expressly enabling any one, except a jury or assessors, to view the place where the facts alleged to have taken place occurred, and they do not justify what was done in this case. Section 556 deals only with the question of interest on the part of a Judge or Magistrate, and confers on him no power that he did not possess before. I cannot regard this argument as sound. The Code is not exhaustive in dealing with the powers of a Magistrate, and it cannot, by omitting to justify a certain course of action on his part, deprive him of powers which he otherwise possesses. Also, it is to be observed that sections 148 and 202 enable a Magistrate to send some one else to see a place that he may inform him about it, and seem to take it for granted that the Magistrate may look at the place for his own information. This view seems to me to be supported by the contents of section 293, which make provision for a jury or assessors viewing a place where an offence is alleged to have been committed. It is true that a Magistrate sitting to decide questions of fact is not mentioned, but I think that this is because he is understood to have the power of inspection already. I think the section may fairly be read as having for its chief object the provision of conditions under which the jury and assessors are to take their view designed to prevent their hearing anything which might influence their minds. I am, therefore, of opinion that the Code does not prevent a Magistrate acting as the Magistrate in this case did.

There remains the general question whether, apart from the Code, a Magistrate may visit the scene of an alleged offence in order to test the evidence he has heard on a question of fact that has been raised before him. That he has such a power seems to me to be proved by what I believe has been a constant practice and also by considerations of what is reasonable. I have known this practice followed in civil cases, and see no reason to make any distinction in criminal cases. The practice is really only to treat immoveable property as an exhibit, and for the Court to go to it as it cannot be brought to the Court. This seems to me a useful method of proceeding, and I have never known of its correctness being called in question.

The authorities that have been quoted before us, to show that such a proceeding is not correct, do not seem to me to support the contention of the petitioners in any way. They are *Girish Chunder Ghose v. Queen-Empress* (1), *Hari Kishore Mitra v. Abdul Baki Miah* (2), and *Queen-Empress v. Manikam* (3), and in all the cases the trying Magistrate visited the scene of the occurrence before he had heard any evidence, and apparently in the absence of the accused. This seems to me to distinguish these cases completely from that now before us, and the observations of Petheram, C.J., in the second of the cases (at page 928) seem to me to go to support rather than to condemn what was done here. The Magistrate in that case had begun his connection with the case by such an investigation as is proper under section 202, and this was disapproved of; but the Chief Justice recognises the fact that it may be desirable for a judicial officer to see the place which is the subject of the investigation before him, if certain precautions are observed, and he confines himself, as I understand the passage in question, to seeing what there is to be seen. It is true that the Chief Justice limits the right of the judicial officer to see a place to cases where he does so "in order to enable him to understand the evidence that is laid before him," and it is on this passage that the petitioner's argument is based that he is not to see the place

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in order to test the evidence. This is not how I understand the passage. If the petitioner's view is correct, the judicial officer is only to see the place in cases where the parties are agreed on the facts, so far as they concern the place, but cannot convey their meaning to the judicial officer, which I cannot think is what the Chief Justice intended. A difficulty would arise if he saw something that was inconsistent with what one of the parties alleged, which would, on the petitioner's theory, lead to the necessity of a new trial. I understand the Chief Justice to mean that the judicial officer may see the place to make up his mind on disputed points raised as to something to be seen there. In addition to these cases, we have the decision of *In re Lalji* (1), where Sir John Edge refused a transfer asked for on the ground that the trying Magistrate had visited the scene of an alleged offence, apparently mischief, after he had heard some evidence for the prosecution, and in the absence of the accused, holding that he had not acted improperly. In the present case the Magistrate made his visit after it was settled what it was that he was to see, and what the issues were which he would decide from his inspection. The accused and complainant seem both to have been present or represented. It is not suggested that he did more in the way of taking evidence than look at the pits and the hut. I consider that this was a correct proceeding, and that he was justified in acting on the opinions he formed from what he had seen in adjudicating between the parties, as otherwise his visit would serve no purpose. I am, therefore, of opinion that the Rule should be discharged.

WOODROFFE J. In my opinion this Rule should be made absolute on the first of the grounds mentioned in the petition. Though there is no express statutory provision in that respect, the case-law and the practice of the Courts appear to establish that a Magistrate may take a view in order to enable him to understand the evidence that is laid before him. This, I think, was not seriously contested, though some reliance was placed

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on the terms of my judgment in *Nidani Mondal v. Alaboxa Sirkar* (1). My language there was not sufficiently guarded, and must be taken in connection with the facts showing the nature of the local investigation in that case. But though a view may be had for the purpose above mentioned, it must be, in my opinion, strictly limited to that. There are indeed Judges who are averse to taking local views at all on the ground that they may be thus unduly influenced. In some cases, however, it may be difficult to appreciate the evidence without a complete model showing the property and its surroundings, or without local inspection. So far, however, as I am aware, there is no authority for holding that a Court may take a view for any purpose other than that of understanding the evidence. The question then is whether, on the facts of the present case, the Magistrate has done more than he is legally entitled to do. The complainant stated, as part of his allegation of possession, that there were certain pits on the land in dispute. The accused denied it. The issue then was as to the existence or non-existence of the pits. There is no question here of the Magistrate going to the land to understand what a pit was, or what it was like, so as to appreciate what had been said of such pits in the evidence. As the learned Deputy Legal Remembrancer has told us, what the Magistrate went to do was to see whether the pits existed in fact, and to see whether the complainant or the accused were speaking the truth on this point. This may perhaps be (speaking without the law) from some points of view, and under certain conditions, a convenient and practical course, and one which might in many cases tend to secure a just decision. But the question is here whether it is permissible in a judicial system which gives to the Court only power to adjudge the existence of facts according as they are deposed to on the evidence before it. If it were, there appears to me to be in such a case no necessity for evidence at all as regards this particular fact. It would be sufficient that the complainant should allege that there were pits in existence. Then, without his oath to that effect, or evidence given on behalf of

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the accused, the Court might go itself and ascertain the truth or falsity of the alleged fact. Would it, for instance, be open to a Judge, however expert he might be on the subject, to pronounce on the strength of his personal observation against the truth of an allegation that a room was dark or deprived of air? I think not. Reference has been made to certain cases where the observation of the Judge is properly part of his judgment. The law allows him to note the demeanour of witnesses. He may also express his opinion on the age and appearance and the like of documents and other material exhibits. But this is because they are part of the evidence in the case, and thus form proper material for his adjudication. This appears to me to be a different thing from pronouncing on the existence of a disputed fact, the subject of observation out of Court.

The principle contended for by the Crown may be tested in another way. Where the Court limits its judgment strictly to the materials placed before it by the parties in Court, then its judgment can be tested by the Court of appeal by reference to these same materials which are also before the Appellate Court. This is not possible where the lower Court's judgment is based on personal observation out of Court. If the Court's impartiality or accuracy of observation were by a party put in question, are we to say that in all such cases the results of the Court's observation must be accepted, even though it may be at variance with the sworn testimony of numerous and reliable witnesses? And if not, what means has the Appellate Court in such a case of deciding the matter?

The next point taken on this subject is with reference to the hut on the land. The complainant alleged that it was used for dwelling-purposes. The accused said it was used for keeping cattle waiting to be slaughtered. The Magistrate says, as a matter of personal observation, that the hut was too small for the latter purpose. This is his opinion and it may be wrong, for he may be in my case and know nothing about the accommodation which is required for cattle about to be slaughtered. This could only have been established by evidence which learned counsel informed us was wanting. Nextly, he did not

acquaint the parties with the opinion he had formed. It has always appeared to me to be a very objectionable practice that the Court should withhold from a party affected an opinion formed by it adverse to him. It seems to me to be only just that an opportunity should be given to such party of showing that such opinion was erroneous. In the present case, learned counsel for the accused states that his client, had he known the Magistrate's opinion, was prepared to give evidence to show that it was ill-founded. It was next contended on behalf of the Crown that no objection was taken by the parties to the proposal (which emanated from the Magistrate himself) to inspect. I do not see what objection could have been taken. It is not for litigants to assume that the Court is going to do that which it is not entitled to do. On the contrary, the accused may have, and in any case should have, assumed that the inspection was going to be held for purposes allowed by law only. When they discovered that this was not so, they took objection before the lower Appellate Court and made it one of the grounds of this Rule.

It was lastly argued for the Crown that, apart from the Magistrate's own observations, there is sufficient evidence on the record to support the conviction. In my opinion such an objection must fail, for it is a matter of entire speculation how far the Magistrate was influenced by what he saw, as distinguished from what was deposed to. The matter in question was an important part of the case. It may be that the Magistrate has allowed a predominant influence to what he himself saw. This is only natural. We cannot say what the result should have been without a retrial, which I think is necessary.

[Owing to this difference of opinion, the case was referred by the learned Chief Justice, under section 429 of the Criminal Procedure Code, to Chatterjee, J.]

Mr. Monnier (with him *Mr. Chippendale*), for the petitioners. Two questions arise for determination: *first*, whether a Magistrate has, during the trial of an offence, power to inspect the *locus delicti* in order to understand or follow the evidence;

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and *secondly*, whether he has the power of inspection for the purpose of determining the credibility of the witnesses. The Code is silent on both points : the only provisions thereof relating to local inspection or inquiry being sections 148, 202 and 293, which do not apply to this case. The Code is exhaustive : see section (1), (2) and *Banu Singh v. Emperor* (1). A criminal Code must be construed strictly in exclusion of rules of procedure not therein contained, though, if the disputed rule is not inconsistent with any particular provision, or the general scheme, or the spirit of the Code, it may be admitted. In accordance with this view, I concede the power of inspection of the *locus in quo* for the purpose of understanding the evidence. But the power of inspection to determine the credibility of evidence is contrary to the general scheme of the Code and to the provisions relating to inquiries and trials. In every inquiry conducted under the Code, it is contemplated that the adjudication shall be on evidence taken in Court, and on such evidence alone (except under sections 148 and 202) : see sections 117, 137(1), 145(4) and 488. Even in cases under section 148, it has been held that the local enquiry thereby authorized must be limited to an inspection of the local features of the case and to testing the evidence on that point only, and that the section does not permit a Magistrate to act on what he saw and inferred as to other matters in issue and capable of proof by evidence in Court : *Lal Behari Saha v. Bejoy Sankar Sikdar* (2), *In re Baikunt Kumar* (3). The determination of the innocence or guilt of the accused must be on evidence taken in Court : see sections 241, 245, 251-257 ; and the introduction into the case of matters personally observed by the Magistrate, on inspection or inquiry, in order to test the accuracy of the prosecution or defence story, is quite foreign to these provisions. The *Explanation* to section 556 does not confer a power not already existing, but merely saves the Magistrate's competency to hold a trial. It does not confer on him a power of local inspection or inquiry, but precludes him, if he has held

(1) (1906) I.L.R. 33 Cal. 1353, 1357. (2) (1905) 10 C. W. N. 181, 182

(3) (1878) 3 C. L. R. 134.

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such inspection or inquiry, *e. g.*, under sections 159 and 202, from becoming thereby incompetent to try] the case. The "inquiry" therein referred to must be an inquiry allowed by the Code : see section 4 (*k*). Further, if a Magistrate is legally justified in holding a local inspection to test the credibility of witnesses, the necessity for holding any trial at all is not apparent, especially in cases of mischief, where the issues might be determined by his going over to the place of occurrence and seeing the damage done for himself. The Magistrate did not place on record the results of his observations, but sprung them on the accused for the first time in his judgment. Again, the matters which he imported in his judgment are matters of inference and opinion, and the accuracy of his observations cannot be tested by the Appellate Court. The decided cases are mostly in my favour : see *Girish Chunder Ghose v. Queen-Empress* (1), *Hari Kishore Mitra v. Abdul Baki Miah* (2), *Queen-Empress v. Manikam* (3), *Nidani Mondal v. Alaboza Sirkar* (4). The observations in *Satri Dulali v. Empress* (5) and *In re Lalji* (6) are against me ; but the latter confuses the two questions for determination here. Another difficulty arises if the Magistrate is empowered to hold a local inspection in order to test the evidence as to a prisoner's guilt or innocence. It would be obviously unfair for the Magistrate to act on his personal observations without noting them on the record, but, if he does so, can the parties cross-examine him on his inspection note, and can he thereafter continue the trial himself ? A person who is the sole judge of law and fact cannot give evidence before himself and continue to act as Judge : *Empress v. Donnelly* (7), *Swamirao v. Collector of Dharwar* (8), *Girish Chunder Ghose v. Queen-Empress* (1), *Hari Kishore Mitra v. Abdul Baki Miah* (2), *Queen-Empress v. Manikam* (3) and see *Queen v. Mookta Singh* (9).

(1) (1893) I. L. R. 20 Calc. 857, 865.

(5) (1899) 3 C. W. N. 607.

(2) (1894) I. L. R. 21 Calc. 920, 928.

(6) (1897) I. L. R. 19 All. 302.

(3) (1896) I. L. R. 19 Mad. 263.

(7) (1877) I. L. R. 2 Calc. 405.

(4) (1905) 9 C. W. N. cxxxii.

(8) (1892) I. L. R. 17 Bom. 299, 303.

(9) (1870) 13 W. R. Cr. 60.

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The Deputy Legal Remembrancer (Mr. Orr), for the Crown.
The Magistrate has the power of inspection even for the purpose of testing the evidence before him. The law is now contained in the *Explanation* to section 556: see *In re Krishnappa Gounden* (1) and *In re Davaraja Nayagar* (2). He can do so provided he does not import into the judgment matters outside the record. Here there was ample oral evidence of the existence of some of the pits on the disputed land and of the erection of the hut by the complainant's master. Apart from the Magistrate's personal observations, the conviction can, therefore, be sustained on the evidence in the case.

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CHATTERJEE J. The main question in this case, and that on which there has been a difference of opinion, is whether a Magistrate can hold a local inspection for the purpose of testing the credibility of the witnesses examined on either side.

I shall first examine the provisions of the Criminal Procedure Code and see whether there is any provision which authorizes such an inspection. Section 148 provides that, in cases under Chapter XII, the District Magistrate or the Sub-Divisional Magistrate may depute a Subordinate Magistrate to make a local inquiry, and the report of such Magistrate will be read as evidence. This section has no bearing on the present case. Section 202 lays down that if the Chief Presidency Magistrate, or any other Presidency Magistrate authorized in that behalf by the Local Government, or a Magistrate of the first or second class, is not satisfied as to the truth of a complaint, he may order a local investigation by any officer subordinate to himself, or a police officer or such other person as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint; and section 203 provides that the result of the investigation shall be used for the purpose of seeing whether there is sufficient ground for proceeding with the case. Only specially qualified Magistrates are, therefore, given this power of ordering a local investigation, which may include an inspection of the locality where a crime has been committed. The result of

(1) (1900) 2 Weir 727.

(2) (1903) 2 Weir 728.

the investigation is one factor only for determining whether the case is to go on. The report is not evidence in the case unless it is proved as such. To this limited extent only, therefore, there is authority for a local inspection by a Magistrate under the Code. Section 293 provides that jurors or assessors in a sessions trial may be asked to view a place of occurrence or connected place, provided they are accompanied by an officer of the Court and hold no sort of communication with any party: they are to be conducted back to the Court, and they must not talk with anybody. Section 294 provides that if a juror or assessor is personally acquainted with any relevant fact, he must be examined and cross-examined as a witness. There is no provision, however, for the Sessions Judge himself joining in the inspection. In this state of the statutory provisions of law, it was held in the case of *Girish Chunder Ghose v. Queen-Empress* (1) that when the Magistrate saw the locality and also a part of the occurrence and referred in his judgment to matters which came under his personal observation, and which, if relevant, should have been deposed to on oath, the Magistrate was disqualified from trying the case. The learned Judges said "the Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact The accused are entitled to have nothing stated against them in the judgment which was not stated on oath in their presence and which they had no opportunity of testing by cross-examination and of rebutting." Then in the case of *Hari Kishore Mitra v. Abdul Baki Miah* (2) it was laid down that the Magistrate can see the locality for the purpose of understanding the evidence, but if he gets any information by personal observation he is disqualified from trying the case. In the case of *Queen-Empress v. Manikam* (3), the Madras High Court held that by seeing the *locus in quo* the Magistrate made himself a witness in the case, and as he is the sole judge of law and fact, he should not try the case. The learned Judges say—"Although the law makes no provision for a local inspection by a Magistrate of the *locus*

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(1) (1893) I. L. R. 20 Calc. 857. (2) (1894) I. L. R. 21 Calc. 920.

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in quo in a case being tried by himself, we do not go the length of saying that under no circumstances may local inspection be made. But we are satisfied that such inspection should only be made for the purpose of enabling the Magistrate to understand the better the evidence which is laid before him, and it must be strictly confined to that." In this state of the case-law the new Criminal Procedure Code was passed in 1898, and the *Explanation* to section 556 was amended by adding that a Magistrate shall not be disqualified from trying a case "by reason only that he has viewed the place in which an occurrence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in the case." This amendment, therefore, overruled those cases which had held that merely by viewing the *locus in quo* the Magistrate made himself a witness in the case and could not try it. It did not directly authorise a Magistrate to make a local inspection, but it saved his jurisdiction to try a case, notwithstanding that he may have made a local inspection or investigation. It did not, however, go the length of doing away with the restrictions under which such investigations should be made as laid down in the case of *Hari Kishore Mitra v. Abdul Baki Miah* (1). It was, therefore, held in the case of *Satri Dulali v. Empress* (2) that the Magistrate can inspect the *locus in quo* to understand the features of the locality, but if he imports into the case anything else, he becomes a witness and cannot try the case. In the case of *Nidani Mondal v. Alaboxa Sirkar* (3), Mr. Justice Woodroffe said that "there was no authority in the Criminal Procedure Code for making any such local investigation as has taken place in this case. In my opinion, local investigation, except where expressly provided by law, is not advisable." In this case the result of the local investigation, which was contrary to the evidence adduced by the accused, was not placed on the record. In the case of *Lal Behari Saha v. Bejoy Sankar Sikdar* (4), where the Magistrate discarded the evidence

(1) (1894) I. L. R. 21 Calc. 920.

(2) (1899) 3 C. W. N. 607

(3) (1905) 9 C. W. N. cccxii.

(4) (1905) 10 C. W. N. 181.

on the record as unreliable and decided the case upon what he saw, heard and inferred at a local inquiry, the order was set aside on the ground that the Magistrate had erred materially in the exercise of his jurisdiction. The learned Judges say "he did not, however, use the local inquiry for the purpose of making himself familiar with the local facts in order that he might test the evidence adduced by both sides at the trial." Although this was a case under Chapter XII, the local investigation was made by the trying Magistrate himself. Mr. Justice Woodroffe in his Judgment in the present case does not refer to the above case, but says that what he said in the case of *Nidani Mondal v. Alaboxa Sirkar* (1), was not sufficiently guarded. The result to my mind of an examination of the statute and the case-law on the subject is that the Magistrate may inspect the *locus in quo* in cases where he cannot follow or understand the evidence without himself seeing the features of the land, and does not, merely by so doing, disqualify himself from trying the case.

But can the Magistrate test the sworn testimony on the record by the light of his own observations? The Allahabad High Court seems to be of opinion that he can. Sir John Edge, C.J., in the case of *In re Lalji* (2) said :—"It appears to me that it never could have been the intention of the Legislature that in a criminal case, in which the evidence is conflicting or is difficult to understand by a person not acquainted with the locality, the Magistrate trying the case should not go and see the locality for himself. It is highly convenient that he should adopt such a course if the evidence is conflicting" In the case of *Lal Behari Saha v. Bejoy Sankar Sikdar* (3), Pargiter and Woodroffe JJ. are reported to have said : "He (the Magistrate) did not, however, use the local enquiry for the purpose of making himself familiar with the local facts, in order that he might test the evidence adduced by both sides at the trial." No doubt this was a case under section 145 of the Criminal Procedure Code, in which a local inquiry by some other Magistrate is permitted by section 148; but it was, nevertheless, a

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(1) (1905) 9 C. W. N. cccxii.

(2) (1897) I. L. R. 19 All. 302.

(3) (1905) 10 C. W. N. 181.

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local enquiry by a trying Magistrate, which is not expressly provided for by the Act.

If the Magistrate has seen a certain state of things, and if witnesses examined before him testify to the contrary, it is natural that he should believe the testimony of his own senses and disbelieve the sworn testimony. It seems to be a psychological impossibility that he should do otherwise. If a Magistrate is required to see a place and its environments for the purpose merely of understanding what the witnesses are speaking about, and to ignore what he has seen when weighing the credibility of the witnesses who confirm or contradict his own senses, it would be asking him to do what no man in the ordinary course of human experience can be expected to do. As soon, therefore, as we admit that a local inspection is permissible, we must admit also that the Magistrate can use the testimony of his own senses for testing the veracity of the witnesses deposing before him as regards the features of the locality. There is no doubt that he may be wrong in his observation, and may, therefore, apply a wrong test which there is no means of controlling or checking, but that is a contingency which is rendered possible by the Code as amended, but which may perhaps be guarded against by requiring him in every case in which he makes a local inspection to place at once on the record a report of what he sees, leaving it open to the parties to qualify or contradict the same by an application for a further inspection. If he does anything more, he will be doing what is neither directly nor indirectly authorised by the law.

It is one of the most cherished and salutary principles of English criminal jurisprudence that no man shall be convicted except upon evidence which he has had an opportunity of testing by cross-examination and contradicting by rebutting evidence. If the Magistrate, therefore, imports into the case any facts which he has himself observed, he would be introducing into the case evidence which has not been subjected to these tests, and in regard to which he may have been misled by his senses or biassed in favour of either party. It is on this account that many Judges refuse to make a local inspection.

When the law, however, allows a view of the locality, and it is in some cases not only convenient, but necessary, for the ends of justice, every possible precaution should be taken that such a view should be nothing but a view of the local features, and an immediate report of what is seen should be placed on the record, and laid open to the scrutiny of the parties.

In this case the learned Magistrate has done much more than viewing the place for the purpose of following or understanding the evidence and testing it. He says: "I myself saw that this place could have only been used for throwing of refuse and not for tethering cattle: the hut is also too small for the purpose of keeping cattle." These are matters of opinion and inference based upon circumstances not on the record. The accused, if aware of the way in which the Magistrate was going to use his inspection, could have adduced evidence or shown by a further inspection that the Magistrate was wrong. To spring such opinions or inferences upon the accused at the time of pronouncing judgment is an error of procedure that may have materially prejudiced the accused, and they are quite justified in complaining that they have not had a proper trial.

In the result, therefore, I agree with Mr. Justice Woodroffe in making the Rule absolute. I think there should be a retrial before another Magistrate with liberty to examine the Magistrate, who made the local inspection, as a witness.

Rule absolute.

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ORIGINAL CIVIL.

*Before Mr. Justice Fletcher.*1910
Feb. 11.

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GULAB CHAND ANUNDJEE.*

Malicious Prosecution—Cause of Action—Complaint laid but no Process issued.

Where in a suit for malicious prosecution, it was averred that a complaint had been laid by the defendant before a Magistrate who thereupon sent the case to the police for enquiry and report, but there was no averment that the Magistrate had ever issued process :—

Held, that the plaint disclosed no cause of action.

Yates v. The Queen (1), followed.

Clarke v. Postan (2) and *Ahmedbhai v. Framji Edulji* (3) not followed.

Thorpe v. Priestnall (4), referred to.

ORIGINAL SUIT.

This was a suit for malicious prosecution. The plaintiff, Charlotte DeRozario, who was a boarding-house keeper, was the tenant of one Mooljee Virjee at No. 70, Elliot Road in Calcutta. The defendant was a nephew and partner of Mooljee Virjee.

It appears that certain disputes arose between the parties in respect of the tenancy, which culminated in the institution of a suit, which, however, was subsequently compromised.

The plaintiff's case was that on the 16th June 1909 the defendant falsely and maliciously and without any reasonable and probable cause laid a complaint against her, under section 380 of the Indian Penal Code, before the Chief Presidency Magistrate of Calcutta, and also asked for a search warrant against her ; that the Magistrate sent the case to the police for enquiry and report ; that the defendant thereafter informed the Police Inspector that he did not desire the enquiry to be proceeded with nor the premises of the plaintiff searched ; that the defendant failed to appear when the case was called on before

*Original Civil Suit No. 97 of 1909.

(1) (1885) L. R. 14 Q. B. D. 648.

(2) (1834) 6 C. & P. 423.

(3) (1903) I. L. R. 28 Bom. 226.

(4) [1897] 1 Q. B. 159.

the Magistrate, who thereupon dismissed the complaint; that the defendant caused a fresh complaint under section 380 of the Indian Penal Code to be lodged against her, which complaint was also dismissed; and that the plaintiff had thereby suffered damage which she estimated at Rs. 6,000.

The pleas taken in defence were, *first*, that no cause of action had been disclosed in the plaint; *secondly*, that the first complaint had been made *bonâ fide*, but that on further enquiry the defendant had abandoned the complaint before the issue of process; and, *thirdly*, that the second complaint had not been laid at the instance of the defendant. The damages were also denied.

It was admitted by both parties that the Magistrate had never issued process. The only step taken, after the complaint had been laid, was that the matter was sent to the Police for enquiry and report.

Mr. N. Chatterjee (with him *Mr. A. K. Ghose*), for the plaintiff. The cause of action was complete. It was not necessary, in order to maintain an action for malicious prosecution, to show that the charge was acted upon by the Magistrate, or that process had issued. The prosecution commenced when the complaint was made: *Clarke v. Postan* (1), *Imperatrix v. Lakshman Sakharan*, *Vaman Hari and Balaji Krishna* (2), *Ahmedbhai v. Framji Edulji* (3); Addison on Torts, 8th Edition, page 249.

Mr. A. N. Chaudhuri (with him *Mr. Sircar*), for the defendant. The plaint did not disclose a cause of action. To found an action for malicious prosecution, it was not enough that a complaint should have been laid before a Magistrate. It was essential that the defendant should have set the Magistrate in motion and that process should have issued. Until the issue of a summons or warrant the prosecution could not be said to have commenced: *Gregory v. Derby* (4), *Yates v. The Queen* (5); Clerk and Lindsell on Torts, 3rd Edition, page 608.

(1) (1834) 6 C. & P. 423.

(3) (1903) I. L. R. 28 Bom. 226.

(2) (1877) I. L. R. 2 Bom. 481, 487.

(4) (1839) 8 C. & P. 749.

(5) (1835) L. R. 14 Q. B. D. 648, 661.

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The averment of issue of process is required under form No. 31, Appendix A, First Schedule, Code of Civil Procedure.

FLETCHER J. This is a suit for malicious prosecution.

The plaintiff alleges in the plaint that on the 16th June 1909 the defendant falsely, maliciously, and without any reasonable and proper cause, laid a complaint under section 380 of the Indian Penal Code against the plaintiff before the Chief Presidency Magistrate, and also asked for a search warrant against her.

The 7th paragraph of the plaint alleges that the Magistrate sent the case to the Police for enquiry and report, but the defendant thereafter wrote to the Police Inspector stating that he did not want to proceed with the case or the house of the plaintiff to be searched. Paragraph 10 of the plaint alleges that a fresh complaint was made against the plaintiff through one Bissonath Dubay, but the said complaint was also dismissed.

The point argued is whether, on these allegations, a suit for malicious prosecution can lie. Mr. Chatterjee admits that the evidence is not enough to carry the case higher, but says that the plaintiff can on these allegations maintain the suit for damages for malicious prosecution.

The case on which Mr. Chatterjee relies is the decision of Chandavarkar and Jacob JJ. in *Ahmedbhai v. Framji Edulji* (1), and there is no doubt that in that case the learned Judge did say that a prosecution commences when a complaint is made, and it is enough if the charge is made to the Magistrate. This statement is made on the authority of a statement taken from Addison on Torts, 8th edition, page 249. The case referred to in Addison is *Clarke v. Postan* (2), which has been considered by Lord Justice Cotton in the case of *Yates v. The Queen* (3).

The case of *Clarke v. Postan* (2) was a mere *dictum* of the Judge at Nisi Prius, and the case of *Yates v. The Queen* (3) is a considered judgment of the Court of Appeal.

(1) (1903) I. L. R. 28 Bom. 226.

(2) (1834) 6 C. & P. 423.

(3) (1885) L. R. 14 Q. B. D. 648, 661.

My opinion is that the decision of Lord Esher and Lord Justice Cotton in *Yates v. The Queen* (1) is to be preferred on this point to the ruling in *Clarke v. Postan* (2).

Looking to the provisions of the Criminal Procedure Code, it is obvious that process never issued at all. Section 200 is the first section in Chapter 16. Section 200 says what should be done on a complaint. In section 202 the marginal note is postponement of issue of process, and states what is to be done in a case when the Magistrate, instead of issuing process, sent the matter to the Police to enquire and report. Then comes Chapter XVII, and the first section of which has the marginal note "Issue of Process," and the Chapter is headed "The commencement of Proceedings."

In this case the Magistrate never issued process. The plaintiff was not prosecuted. The only step taken was that the matter was sent to the Police for enquiry and report.

I think that the case of *Ahmedbhai v. Framjee Edulji* (3), which relies on the statement in Addison on Torts, that the prosecution commences from the date of complaint, is sufficiently explained by the case of *Thorpe v. Priestnall* (4). This case shows that once summons is issued the commencement of prosecution relates back to the laying of the information or making of the complaint. It is to be noticed that the learned Judges in the Bombay High Court did not refer to the case of *Yates v. The Queen* (1), nor was such case cited to them in the course of the argument.

In these circumstances, I prefer to follow the decision of *Yates v. The Queen* (1) rather than the decision of *Ahmedbhai v. Framjee Edulji* (3). I hold, therefore, that the plaint discloses no cause of action, and the suit must therefore be dismissed with costs on scale No. 2.

Suit dismissed.

Attorney for the plaintiff: *M. N. Ganguly*

Attorneys for the defendant: *Manuel & Agarwalla.*

J. C.

- (1) (1885) L. R. 14 Q. B. D. 648, 661. (3) (1903) I. L. R. 28 Bom. 226.
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APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Woodroffe.*

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Jan. 25.

PURA SUNDARI DASI

v.

BIJRAJ NOPANI.*

Vendor and Purchaser—Executor, conveyance by, as beneficial owner—Construction—Inconsistency between recitals and operative part—All-estate clause, effect of—Partition—Permanent Improvements—Enquiry.

A Hindu, governed by the Bengal school of Hindu Law, died in 1886 leaving a will, whereby he devised certain immoveable property to his daughter A, subject to certain charges by way of maintenance. Probate was granted to the executors B and others in 1887. A died in 1891 intestate, leaving her surviving five sons, B and four others, a married daughter, and two unmarried daughters, the plaintiff and another. In 1900 a conveyance of the property was executed by B and his surviving brothers in favour of the defendants. This deed proceeded on the assumption that B and his brothers were absolutely and beneficially entitled to the property; they, however, purported to convey "all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon the said property." On a suit instituted by the plaintiff for the declaration of her title to a moiety in the property and for partition:—

Held, that inasmuch as on A's death the property devolved as her *stridhan* property on her unmarried daughters, and as B did not purport to sell and convey as executor, the plaintiff was entitled to a moiety in the property as against the defendants, and that a decree for partition should be passed.

Inasmuch as by a decree, dated the 10th December 1903, the defendants became absolutely entitled to the moiety which had devolved on plaintiff's unmarried sister, and as the defendants had expended moneys in improving the property:—

Held, that there must be an account of the money expended by the defendants in permanent improvements since the 10th December 1903, and an enquiry as to the extent to which the present value of the property had been increased by the expenditure.

APPEAL by the plaintiff, Pura Sundari Dassi, from the Judgment of Stephen J.

Premchand Bysack, a Hindu governed by the Bengal school of Hindu Law, died in the year 1886, leaving a will whereby

*Appeal from Original Civil, No. 17 of 1909, in Suit No. 464 of 1907.

he appointed as his executors his son-in-law, Shambhunath Bysack, and the latter's two sons, Hemendranath Bysack and Ratanlal Bysack. The testator devised No. 8 Sobharam Bysack's Street in Calcutta to his daughter Sreemati Katyani Dasi and her heirs absolutely, subject to two charges of twenty rupees a month each for maintenance in favour of his daughters-in-law, Sreemati Barada Sundari Dasi and Sreemati Sonamoni Dasi. Probate of the will was granted on the 12th July 1887 to the three executors appointed by the will.

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Sreemati Katyani Dasi died intestate on the 8th April 1891, leaving her surviving her husband, Shambhunath Bysack, five sons including Hemendranath Bysack, and three daughters, Maya Sundari Dasi who was then married, and Kanak Manjari Dasi and Pura Sundari Dasi who were then unmarried and minors.

On the 12th December 1900 a conveyance of the property, No. 8 Sobharam Bysack's Street, was executed by Hemendra Nath Bysack and his two surviving brothers in favour of the defendants Bijraj and Dowlatram. The deed proceeded on the assumption that Hemendranath and his brothers, who are therein described as "vendors," were absolutely and beneficially entitled to the property. The deed after reciting, *inter alia*, the death and the will of the testator, the death of Katyani Dasi, the death of her husband and of several of her sons, continued—"And whereas the said Hemendranath Bysack, the sole surviving executor of the said will, has since paid all the debts, liabilities and legacies mentioned in the said will..... and whereas the vendors have taken upon themselves the responsibility.....of satisfying the claim (if any) of their sisters the said Sreemati Maya Sundari Dasi and Kanak Manjari Dasi, who are both married, and of the infant Pura Sundari Dasi who is still unmarried (and the latter two of whom are precluded from succession being born after the death of the testator)....." The consideration-money, the sum of Rs. 35,000, was expressed to be paid to the "vendors." The covenants for title were such as were appropriate to a conveyance by absolute owners, and the vendors further undertook "to keep

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the purchasers, their heirs, representatives and assigns harmless and indemnified against all actions, suits, proceedings, costs, damages, claims and demands or losses, and specially of the three sisters Maya Sundari Dasi, Kanak Manjari Dasi, and Pura Sundari Dasi and their heirs respectively." By an 'all-estate clause' the vendors purported to convey to the purchasers "all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon" the property.

Of the two ladies, Barada Sundari Dasi and Sonamoni Dasi, in favour of each of whom there was a charge on the property by way of maintenance, the former joined in the conveyance, and the "vendors" undertook to satisfy the claim of the latter.

In the month of February 1901, Kanak Manjari Dasi filed a suit, being suit No. 88 of 1901, against Hemendranath Bysack, his surviving brothers, Sonamoni Dasi, Barada Sundari Dasi, the plaintiff, Pura Sundari Dasi, who was then a minor, the purchasers, Bijraj and Dowlatram, and others for the construction of Premchand Bysack's will, for the declaration of her right in respect of the property No. 8 Sobharam Bysack's Street, and consequential relief. This suit was compromised between Kanak Manjari Dasi and the purchasers, the former receiving the sum of Rs. 4,000 in full satisfaction of her claim, and a decree was made accordingly without prejudice to the rights of Pura Sundari Dasi who was then a minor.

The plaintiff attained her majority on the 13th November 1906. The plaintiff claimed that, under the provisions of the will of Premchand Bysack, Katyani Dasi became absolutely entitled to the property No. 8 Sobharam Bysack's Street as her *stridhan*, subject to the two charges mentioned above, and that on the death of the latter the property devolved on Kanak Manjari Dasi and herself as the maiden daughters, and as such the heiresses of Katyani Dasi under the Bengal school of Hindu Law to the exclusion of the sons and the married daughter. The plaintiff demanded possession from the defendants of an equal undivided half share in the property, but her title was denied. Thereupon, she instituted this suit for a declaration of her title, for partition and for consequential relief.

It was pleaded in defence that the sale and conveyance of the property on the 12th December 1900 was necessary for the liquidation of various debts, costs and charges for which the estate of Premchand Bysack was then liable, and that the purchase-money had been applied in due course of administration of the estate. It was contended that although Hemendranath Bysack was not expressly described in the conveyance as executor of the will of Premchand Bysack, the rights of the defendants as purchasers were not affected thereby, and that they acquired a good title to the property. It was alleged that the purchasers believing in good faith that they had acquired a good title, had the old dilapidated buildings standing on the premises pulled down, and a new three-storied building erected on the site at a cost of about Rs. 60,000. The defendants submitted that in any event they were entitled to compensation for this improvement.

Stephen J. being of opinion that Hemendranath Bysack must be taken to have acted as executor, and that the terms of the conveyance passed his interest as such, held that the plaintiff was not entitled to relief against the purchasers and dismissed the suit. After setting out the facts, his Lordship continued :—

“ The defendants do not allege that the conveyance can have had any effect unless it passed the estate held by the executor, and the question I have to decide is therefore whether it had this effect. Before dealing with this question generally, I will, however, notice the point made by the plaintiff that the will contained an implied restriction on sale of the house in question, as if it did, leave of the Court was necessary to give title, and this has not been obtained. There is not much in support of this contention to be found in the actual terms of the will. Provision is made for the payment of funeral and sadh expenses out of the proceeds of the sale of Government Promissory Notes and for the payment of the costs of probate, arrears of wages, certain bills and other debts, if any, out of the rents and profits of the house in question which, as I have said, is also made liable to the charges in favour of the testator's daughters-in-law. It is not, however, easy to see how this can amount to a restriction, and the plaintiff bases his argument chiefly on the fact that a specific legacy is in itself an implied restriction, since by section 108 of the Probate and Administration Act, 1881, the thing specified is to be “ delivered to the legatee without any abatement.” This enactment, however, only regulates the rights of the legatees among themselves, and the governing words of the section “ where the assets are sufficient for the payment of debts” prevent the concluding words which I

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have quoted from acting as a restriction. The decision in *Shri Beharilalji v. Bai Rajbai* (1) is relied on by the plaintiff, but has no bearing on the present case, as there were in Premchand's Will no restricted power of sale nor any particular indication that the property was to be retained as there were in the case referred to. A stronger point made by the plaintiff is that as set out in paragraph 5 of the plaint. Hemendra applied to this Court for leave to sell this property, and on the 4th September 1900 an order was made directing an enquiry as to whether there was any necessity for the sale, and whether the sale would be for the benefit of the infant daughters of the deceased Katyani, namely, Kanak Manjari and the plaintiff. Accounts were filed and the reference seems to have been kept on foot till the ensuing April, but nothing was ever done in it, as Hemendra informed his attorney that he was going to sell the property without leave before the matter could be proceeded with. This incident throws light on the view of the situation taken by the vendors and purchasers at the time of the conveyance, but I cannot take it, in spite of the inferences that may be drawn from the order of this Court, as a guide to the construction of the will.

I hold, therefore, that there is no implied restriction on alienation in the will, and the question then becomes, must Hemendra be taken to have acted in the sale to Bijraj and Dowlatram as executor, and did the purchasers take anything by this conveyance?

There are certain matters of fact in relation to this question which must be considered before the legal question can be determined.

In the first place it appears that at the time of the conveyance Hemendra had not paid off a mortgage that he and his co-executors had entered into to cover the cost of probate. The cost had been increased by an unsuccessful opposition to the grant of probate, and to meet them the executors mortgaged the premises in suit for Rs. 3,950 to Dwarkanath Dutt, their attorney, Katyani joining in the mortgage deed.

Dwarkanath's representatives brought a suit on the mortgage which was settled by a reconveyance by Hemendra as the surviving executor dated the 12th December 1900, the date of the conveyance to the purchasers, in consideration of the payment of Rs. 5,529. As far as Hemendra is concerned the reconveyance must be taken to be a consequence of the conveyance, as it is plain that the purchase-money payable under the conveyance was used to pay off the mortgage, and the matter is made more certain by the fact that practically all the notes which formed the consideration for the payment of the mortgage were received as consideration for the conveyance. In the reconveyance Hemendra is expressly treated as executor, and as the re-conveyance is necessarily subsequent to the other transaction, it is difficult to see how it can be said that Hemendra was not then an executor.

On the other hand other claims on the testator's estate were dealt with at the time of the conveyance in a way that tends to show that Hemendra was not an executor. So by the deed itself provision is made for a retention of ten thousand rupees by the purchasers to provide twenty rupees a month to meet Sonamoni's charge, for which a suit was then pending, and payment of a lump

sum to Barada was provided for on her becoming party to the deed. These matters, however, were a part of the disposition created by the deed and add nothing to the assertion by the vendors of their absolute title to the property.

Under the circumstances, I have to consider whether there is anything in this case to prevent the application of the general rule summarised in Norton on Deeds (1906 Edn.), page 271, "A conveyance * * * of all the estate, right, title or interest of the grantor in property to a purchaser for value passes every interest of the grantor, although not vested in him in the character in which he is made a party to the conveyance." The case of *Drew v. The Earl of Norbury* (1) is authority for the proposition that "when a person having several estates and interest in a denomination of land joins in conveying all his estate or interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him, in the character in which he became a party to the conveyance." The case of *Taylor v. London and County Banking Company* (2) goes to show that *à fortiori* the same rule must be applied where the vendor had only one estate or interest in the property in question, and made out that he was entitled to a larger interest than he was entitled to in the conveyance to the purchaser. In *Rooper v. Harrison* (?) the application of the rule to persons holding in *autre droit* is considered, and the opinion of the Court was expressed that an exception to the general rule occurred in the case of persons holding estates per *autre droit*, and that an assignment by a person of all his goods and chattels would not pass those he held as executor unless he had none of his own, a limitation on the exception to the general rule that seems applicable to the present case, if we substitute for all his goods and chattels his right, title and interest in the premises affected. The facts before the Court were the converse of those in the present case, the conveyance being by executors and the question being whether this included the estate which one of them held for his own purposes and in his own right; but this does not seem to affect the application of the principle on which the opinion of the Court was expressed.

It has been argued before me that the general rule is not applicable to the present case because the vendor purports to act as absolute heir and the conveyance contains recitals which constitute a denial of his character as executor. In the cases I have mentioned, however, I find nothing to support this contention. The vendors made out a title as did the vendors in the present case, but that did not prevent their being considered to have exercised rights which were not disclosed. In this case it is true that the title they acted on is inconsistent with that under which it is sought to enforce their action, and which is in fact denied; but the question cannot be decided on their representations made in the recitals, but on the rights which they must in fact be held to have exercised. If the evidence showed that the purchasers were in any way cognizant of the existence of the mortgage, which I have taken as evidence of the continuance of the executorship, I might be able to treat the conveyance as a collusive act. But the only evidence of this is the close connection between the conveyance

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(1) (1846) 3 J. & L. 267.

(2) [1901] 2 Ch. 231.

(3) (1855) 2 K. & J. 86, 112.

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and the mortgage, and though this is suspicious, I cannot take it as conclusive. It may be argued that in the present case the vendor does not make out a good title because the facts recited disclose the absolute rights of the plaintiff to what she claims. The covenant to protect the purchasers against the claim of the plaintiff also goes to show that the purchasers were aware of a defect in the title put forward. But the fact that the purchasers were content with a defective title does not of itself affect the question of the capacity in which the vendors acted.

The plaintiff finally argues that the vendors in the conveyance of December 1900 had such an interest in the demised premises as to bring the case within the general exception expressed in *Rooper v. Harrison* (1), for the plaintiff and her family being governed by the Bengal school of Law; the plaintiff, if she took at all, would take only as a limited owner and on her decease without disposition of the property, the vendors would take by inheritance from their mother. They had thus a contingent interest in the property which they could assign in equity. The question as to the devolution of the property in question was not fully argued before me, as the plaintiff only raised the point in reply. But from a passage in Banerji's Law of Marriage and Stridhan, at page 292, it certainly seems that the property in the plaintiff's hand would not be *stridhan*, though how far she would take a limited estate is not clear. But, however that may be, I find nothing in the opinion expressed in *Rooper v. Harrison* (1), where the interest that was not that of an executor was vested to suggest that the vendors held any other estate than one in *autre droit*.

If this interest of the vendors cannot be used as the plaintiff asks to use it, its remote and contingent character serves in some degree to emphasise the difference between the present case and such cases as the *Bank of Bombay v. Suleman Somji* (2) and the cases, there cited, of *In re Queale's Estate* (3) and *Graham v. Drummond* (4), whatever its application to the present case may be. For in these cases the question was one of the effect of a conveyance from one who was in fact a legatee as well as an executor, whereas here none of the vendors were legatees, though it may be argued that they purported to act as such. The result is that I must hold that at the time of the conveyance Hemendra was an executor, and that the terms of the conveyance passed his interest as such, and that the plaintiff is not entitled to relief against the purchasers.

Judgment for the defendant with costs."

From this judgment the plaintiff appealed.

Mr. B. Chakravarti (with him *Mr. H. D. Bose*), for the appellant. The learned Judge proceeded on the presumption that where one of the parties purporting to convey had the power to convey, the title of the purchasers was perfected by the insertion of the "all-estate" clause. The rule of construction

(1) (1855) 2 K. & J. 86, 112.

(2) (1908) 8 C. L. J. 345,

(3) (1886) 17 L. R. Ir. 361.

(4) [1896] 1 Ch. 968.

which has now been codified by the Conveyancing and Law of Property Act of 1881, 44 and 45 Vict., C. 41, section 63, was established by judicial decision: *Johnson v. Webster* (1), where it is laid down that "*prima facie*, when a person conveys an estate, he means to include in the conveyance every interest which he can part with and which he does not except." The deed itself must be looked to, to gather its purport. Here, the purchasers knew of the twofold character of the vendors and expressed their willingness to accept only their beneficial interest in the property. It was most significant that an indemnity should have been given. How then could any equitable presumption arise in the present case? The interest *qua* executor was excepted, and the purchasers took an indemnity in case of ouster: *Carter v. Carter* (2). *Rooper v. Harrison* (3) is an authority in my favour. The passage in Norton on Deeds, page 271, relied on by the learned Judge, read with the passage at page 273, clearly shows that the rule applies only in the case of a deed wherein no exception is made. The deed must be construed as a whole: the operative part may be controlled by the recitals: *Ex parte Dawes*, *In re Moon* (4), *Francis v. Minton* (5), Norton on Deeds, pages 276, 278. To construe the deed as giving a good title to the purchasers would be in denial of the fiduciary position of the vendors. The learned Judge relied on *Taylor v. London and County Banking Company* (6).

[JENKINS C.J. I do not think these authorities very profitable. The question is purely one of construction of the deed: Dart on Vendors and Purchasers, 7th edition, Vol. I, page 565, Transfer of Property Act, section 8.]

Mr. B. C. Mitter (with him *Mr. Sircar*), for the respondents. Where an intention is expressed in the operative part of a conveyance that the purchaser will become absolute owner, the purchaser will be considered to have acquired that interest, if the conveying party had power to pass that interest, independently of the character of the conveying party. The

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(1) (1854) 4 De. G. & M. & C. 474, 488. (4) (1886) L. R. 17 Q. B. D. 275.

(2) (1857) 3 K. & J. 617.

(5) (1867) L. R. 2 C. P. 543.

(3) (1855) 2 K. & J. 86.

(6) [1901] 2 Ch. 231.

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existence of recitals in a deed of a contrary tendency will not control the effect of the dispositive clause. [JENKINS C.J. You do not suggest that the deed is to be construed without looking at the recitals?] The recitals may be considered, but they must not be taken to override the operative part of the deed, if there is no ambiguity there. Hemendranath must be presumed to have acted as executor: *In re Venn and Furze's Contract* (1). The failure to describe himself as such did not affect the sale: *Preonath Karar v. Surja Coomar Goswami* (2). *Rooper v. Harrison* (3) is an authority entirely in my favour. *Ex parte Dawes, In re Moon* (4) has no application.

[JENKINS C.J. That case was decided on the construction of that particular deed. In the present case the purchase money should have been paid to the executor, if he was acting as such: *In re Cooper and Allen's Contract for sale to Harlech* (5). You are attempting to set up a sale which was a breach of trust, and to give an extended meaning to a deed involving a breach of trust.]

The purchasers who believed in good faith that they were absolutely entitled to the property and expended a large sum of money on improvements, are entitled to an account of the moneys spent by them. Moreover, the suit being for partition, the purchasers are also entitled as tenants in common: *In re Jones, Farrington v. Forrester* (6), *Williams v. Williams* (7), *Durgozi Row v. Fakeer Sahib* (8); Seton on Decrees, Vol. II, page 1860; Transfer of Property Act, s. 51.

Mr. Chakravarti, in reply. Section 51 of the Transfer of Property Act had no application.

[JENKINS C.J. This case does not come strictly within section 51, as there is no question of eviction.]

On the question of tenancy in common, it was important to notice that the purchase was effected on the 12th December, 1900, in defiance of the rights of both the maiden daughters;

(1) [1894] 2 Ch. 101.

(2) (1891) 1 L. R. 19 Cal. 26.

(3) (1855) 2 K. & J. 86.

(4) (1886) L. R. 17 Q. B. D. 275.

(5) (1876) L. R. 4 Ch. D. 802.

(6) [1893] 2 Ch. 461.

(7) (1899) 81 L. T. R. 162.

(8) (1906) 1 L. R. 30 Mad. 197.

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in the month of February 1901 Kanak Manjari brought her suit in which a decree was passed on the 10th December 1903 : so that for three years the respondents were on the land as trespassers. All the authorities cited were based on the doctrine of acquiescence, where the co-tenancy was admitted.

Mr. Mitter. Acquiescence may be one ground for obtaining the value of an improvement. The real principle is that one cannot be allowed to profit by an improvement without paying for it. [JENKINS C.J. You limit your claim to the improvements made subsequent to the decree of 1903 ?] Yes.

Cur. adv. vult.

JENKINS C.J. There is no dispute as to the facts in this case : the question is, whether the conveyance under which the defendants claim, displaced the title the plaintiff would otherwise have possessed.

The plaintiff claims a moiety of the property in suit subject to a charge of Rs. 20 a month, and her title is made out as follows :—Premchand Bysack died on the 23rd of June 1886 leaving a will, whereby he left his house, No. 8 Sobharam Bysack's street, to his daughter Sreemati Katyani Dasi absolutely, subject to two charges of Rs. 20 each. Probate of this will was granted on the 12th of July 1887 to the executors Shambhunath Bysack, Hemendranath Bysack, and Ratan Lal Bysack. Sreemati Katyani Dasi died on the 8th of April 1891, leaving her surviving five sons, including Hemendra Nath Bysack, and three daughters, Maya Sundari Dasi, who was then married, and Kanak Manjari Dasi and the plaintiff, who were then unmarried and minors.

On the 6th of October 1888 Shambhu Nath Bysack, Hemendra Nath Bysack and Ratan Lal Bysack, as the executors of Premchand Bysack's will, mortgaged the property in suit to Dwarka Nath Dutt, but on the 12th of December 1900 a re-conveyance was executed in favour of Hemendra Nath, the sole surviving executor.

On the same 12th of December a conveyance was executed by Hemendra Nath and his surviving brothers in favour of the

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defendants Bijraj and Dowlatram. The deed proceeded on the assumption that Hemendra Nath and his brothers were absolutely entitled to the property : it is, however, now admitted that this was not so, but that on Katyani's death it devolved, as her *stridhan* property, on the unmarried daughters, so that the present plaintiff became entitled to the moiety she now claims in this suit. It is, however, urged by way of defence to her claim that Hemendra Nath, as the surviving executor of Premchand's will, was in that capacity enabled to create a title that would defeat the plaintiff's, and in this connection special reliance was placed on the general words whereby the vendors purported to convey all their estate, right, title, interest, claim and demand in the property. Cases were cited to us in support of this contention, but the law is clear : it is the true interpretation of the deed that has to be ascertained. Hemendra Nath is not expressed to be a party to the deed as executor ; on the contrary, he was made a party of the first part together with his surviving brothers, and they were together described as vendors, and the recitals point to the theory that he and his brothers were regarded as together absolutely and beneficially entitled to the property. Then the consideration money is expressed to be paid not to him alone, as would have been the case had he been selling as executor, but to him and his co-vendors. And, finally, not only are the covenants for title such as are appropriate to a conveyance by absolute owners, but the vendors undertook to keep the purchasers and their heirs indemnified against all claims and demands by Sonamoni as annuitant under the will, or by their sisters, of whom the present plaintiff was one. This all goes to show that Hemendra Nath and his brothers joined in the transfer as beneficial owners. But matters do not rest there, for there are indications in the deed which go to negative the theory that Hemendra Nath was conveying as executor. Thus it is recited that all debts and legacies mentioned in the will had been paid, and, as I have already said, the consideration money is expressed to be paid to the three vendors. If Hemendra Nath was selling as executor, his hand alone should have received

the purchase money, and it was the purchasers' duty to have paid it to him and him alone. And this is more than a technical objection, for the money having been paid, as it was, to the three vendors as though it was their own, it is not unreasonable to assume that they dealt with it as such, and what has now become of it does not appear. Certainly there is nothing to suggest the inference that any part of it has reached the plaintiff, so that it might be a serious detriment to her to regard the transaction as one carried out by Hemendra Nath as executor.

It comes then to this, that not only is the defendants' contention opposed to the natural meaning of the document, but it involves a payment of the purchase-money in a mode not sanctioned by the relationship that this contention assumes. It in no way helps the solution of this case to cite decisions in which it has been held that by virtue of general words an interest may pass that is not specifically mentioned in a deed, as they merely proceed on the principle that a document should be so interpreted as to carry into effect the intention of the parties. But from a general consideration of the present conveyance, it is to my mind clear that Hemendra Nath did not intend to join, and did not in fact join, in it as an executor.

It follows from this that the defendants' title cannot prevail against the plaintiff, and that her suit should not have been dismissed.

Though the suit, as originally framed, was for recovery of possession, it was subsequently so amended as to include a prayer for partition, and, in the circumstances, there must be a decree for partition. There must be an account of rents and profits by the defendants and their predecessors in title, and also of the money expended by them in permanent improvements since the 10th of December 1903, the date of the decree passed in suit No. 88 of 1901. There must also be an inquiry as to the extent to which the present value of the property has been increased by the expenditure. Further consideration will be reserved, and there will be liberty to apply. This is very necessary in the circumstances of this case, as the result of the

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account and enquiry may make it necessary to obtain further directions from the Court.

Each party will bear his or her own costs up to the 18th of January 1909. From the 18th of January the defendants must bear the plaintiff's costs including the costs of this appeal, except the costs of the 17th of January last. The defendants are entitled to the costs of the 17th of January, and those costs will be set off against those directed to be paid by the defendants respondents.

WOODROFFE J. I agree.

J. C.

Appeal allowed.

Attorney for the appellant : *R. L. Bysak.*

Attorney for the respondents : *K. N. Ganguli.*

APPELLATE CIVIL.

Before Mr. Justice Holmwood and Mr. Justice Chatterjee.

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 Feb 1.

CHAIRMAN, MUNICIPAL BOARD, CHAPRA,

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BASUDEO NARAIN SINGH.*

Assessment—Bengal Municipal Act (Beng. III of 1884), s. 116—Civil Court, jurisdiction of—Ultra vires.

Under s. 116 of the Bengal Municipal Act, the decision of the Objection Committee in matters regarding the amount of assessment is final, and the Civil Court has no jurisdiction to interfere in such matters. It can only interfere when the assessment is *ultra vires*.

Manessur Dass v. The Collector and Municipal Commissioners of Chapra (1) referred to.

Navadip Chandra Pal v. Purnananda Saha (2) and *Kameshwar Pershad v. The Chairman of the Bhabua Municipality* (3) distinguished.

* Appeal from Appellate Decree, No. 733 of 1908, against the decree of Sarada Prasad Bose, Subordinate Judge of Chapra, dated Dec. 17, 1907, reversing the decree of Bhupendra Nath Mookerjee, Munsif of Chapra, dated April 30, 1907.

(1) (1876) I. L. R. 1 Calc. 409.

(2) (1898) 3 C. W. N. 73.

(3) (1900) I. L. R. 27 Calc. 849.

SECOND APPEAL by the defendant, the Chairman of the Municipal Board, Chapra.

This appeal arose out of an action brought by the plaintiff for a declaration that the assessment made by the Municipality was *ultra vires* and not binding on him.

The plaintiff alleged that the previous assessment of his holding was Rs. 6 and annas 8 only, and that in June 1906 the Municipality assessed it at Rs. 18; that the said assessment was not in accordance with the provisions of the Municipal law, inasmuch as no alteration or improvement was made on the holding since the previous assessment; that the assessor who made the assessment did not personally inspect the house, but relied on the report of the Tax Daroga.

The defence, *inter alia*, was that section 116 of the Bengal Municipal Act was a bar to the suit, and that the assessment was not bad in law or *ultra vires*.

The Court of first instance dismissed the plaintiff's suit on the ground that the assessment was not illegal or unfair. But, on appeal, the learned Subordinate Judge of Chapra reversed the decision of the first Court.

Against that decision the defendant appealed to the High Court.

Babu Ram Charan Mitra, for the appellant.

Babu Umakali Mukherjee and *Babu Akshoy Kumar Banerji*, for the respondent.

Cur. adv. vult.

HOLMWOOD AND CHATTERJEE JJ. This is a second appeal from the judgment and decree of the Subordinate Judge of Chapra, who, reversing the decision of the Munsif in a suit by a rate-payer to have his municipal assessment reduced as illegal and *ultra vires*, held that the tax had not been assessed on the proper valuation of the holding, and that therefore the plaintiff was entitled to a decree.

This finding is obviously untenable. The Civil Courts have nothing to do with the correctness or otherwise of the valuation; they can only interfere when the assessment is *ultra vires*.

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It is urged before us that it is *ultra vires*, because there is nothing to show that the assessor actually did inspect the premises, and because the record of the proceedings before the Objection Committee would lead to the inference that the appellant had no proper hearing. On a consideration of the authorities, we think we have no jurisdiction to interfere with the assessment. The ruling in *Manessur Dass v. The Collector and Municipal Commissioners of Chapra* (1) appears to bind us.

The jurisdiction to interfere in matters regarding the amount of assessment has been withdrawn by express legislation, and section 116 makes the decision of the Objection Committee final. The cases of *Navadip Chandra Pal v. Purnananda Saha* (2) and *Kameshwar Pershad v. The Chairman of the Bhabua Municipality* (3) do not affect this general principle and are clearly distinguishable. But where the Municipality have the power to make a fresh assessment as they have every three years, and merely raise the valuation, the Civil Court has no power to revise the valuation, but is bound to accept it as conclusive.

As a matter of fact there is no positive evidence in this case that the valuation was excessive. The Courts were merely asked to draw an inference from the absence of evidence of increase in value in the five years previous to suit. We are, therefore, obliged to hold that the Civil Court had no jurisdiction in this case, and that the learned Munsif in the Court of first instance was right in dismissing the suit. We accordingly decree the appeal, and direct that the judgment and decree of the Subordinate Judge be set aside and the plaintiff's suit dismissed with costs in all Courts.

Appeal allowed.

S. C. G.

(1) (1876) I. L. R. 1 Calc. 409,

(2) (1898) 3 C. W. N. 73.

(3) (1900) I. L. R. 27 Calc. 849.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Tennon.

KISHORILAL ROY CHOWDHURY

v.

KRISHNA-KAMINI CHOWDHRANI.*

1910
Feb. 2.

Landlord and Tenant—Building and Residential Lease—Heritability—Transferability—Transfer of Property Act (IV of 1882), s. 108 (j).

Where there is a lease for building and residential purposes, in the absence of any intention to the contrary, indicated either in the terms of the grant or in the nature of the tenancy, the leasehold interest is heritable, and the tenancy does not determine by the death of the lessee, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit.

Such a tenancy, in the absence of any custom or contract to the contrary, is governed by the provisions of the Transfer of Property Act, and is consequently *prima facie* transferable under s. 108 (j) of that Act.

SECOND APPEAL by the defendant No. 1, Kishorilal Roy Chowdhury.

The facts are briefly as follows. The plaintiff, Sreemati Krishna-Kamini Chowdhrani, and the defendants Nos. 1, 3 and 4 were the owners of a certain taluq in which the land, which formed the subject-matter of dispute in this suit, was situate. This land had been held under the owners thereof by one Rajani Kumar Dey as his homestead land from about 1889. After the death of Rajani Kumar Dey, which occurred about 1897, his heirs sold the said land on the 25th February 1901 to Ghanesyam Pandey, the defendant No. 4, who in turn sold it on the 1st June 1901 to Kishorilal Roy Chowdhury, the defendant No. 1, in the name of the latter's servant, one Nil Madhab Chowdhury, the defendant No. 2. Kishorilal Roy Chowdhury, after his purchase, erected some buildings on the land purchased. On the 8th August 1905 the plaintiff filed the present suit for recovery of *khas* possession of a half-share of the land purchased by the defendant No. 1.

*Appeal from Appellate Decree, No. 440 of 1907, against the decree of H. Walmsley, District Judge of Dacca, dated Dec. 11, 1906, reversing the decree of Mohim Chandra Chakravarti, Munsif of Narainganj, dated April 30, 1906,

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The Court of first instance decreed the suit in a modified form. The plaintiff thereupon appealed to the District Judge, and a cross-appeal was filed by the defendant No. 1. The learned Judge decreed the appeal and dismissed the cross-appeal. The defendant No. 1 now appealed to the High Court.

Babu Dwarka Nath Chakravarti (with him *Babu Tarak Nath Chakravarti*), for the appellant. The title of the appellant to the disputed land, which arises out of the sale of the same to him by its tenant, is a valid one, inasmuch as the leasehold interest being an interest in land is heritable and as such is transferable : *Tej Chund v. Sri Kanth Ghose* (1). Furthermore, the appellant, in his right as coparcener, is in possession. He has made certain improvements by building structures on the land, and the respondents have suffered no loss.

Dr. Rashbehary Ghose (with him *Babu Harendra Narain Mitter* and *Babu Upendra Lal Roy*), for the respondents. The respondents as co-owners are entitled to a share in the disputed land. A leasehold interest is not necessarily heritable, and to be such it must be clearly indicated either in the terms of the grant or by the very nature of the interest : *Vaman Shripad v. Maki* (2), *Rajaram v. Narasinga* (3), *Narsingh Dyal Sahu v. Ram Narain Singh* (4), *Kailash Chandra Pal v. Hari Mohan Das* (5). Further, the tenancy is not transferable, and the appellant's title to the land is consequently not valid.

Babu Dwarka Nath Chakravarti, in reply, referred to *Amba Debya v. Jnanoda Sundari* (6) and *The Shamnugger Jute Factory Co., Ltd. v. Ram Narain Chatterjee* (7).

Cur. adv. vult.

MOOKERJEE AND TEUNON JJ. This is an appeal on behalf of the first defendant in an action for recovery of possession of land. The plaintiff and the first, third and fourth defendants are owners of the *taluk* in which the disputed land is situated.

(1) (1844) 3 Moo. I. A. 261.

(2) (1879) I. L. R. 4 Bom. 424.

(3) (1891) I. L. R. 15 Mad. 199.

(4) (1903) I. L. R. 30 Calc. 883.

(5) (1909) 13 C. W. N. 541.

(6) (1899) 4 C. L. J. 254.

(7) (1886) I. L. R. 14 Calc. 189.

The land has been used, according to one of the witnesses for the plaintiff, as homestead land for about half a century, and it has been in the occupation of tenants from time to time. About 1889 the land was let out to one Rajani Kumar Dey who raised structures thereon and occupied them till his death in or about the year 1897. He left a widow, Susila Sundari, and three infant sons who remained in occupation of the land and buildings after his death. On the 25th February 1901, Susila Sundari, as the guardian of her infant sons, conveyed the premises to one Ghanesyam Pandey, who on the 1st June 1901 sold the property to the first defendant, one of the superior landlords, in the name of his officer, the second defendant. Shortly after, the plaintiff commenced an action against her co-sharer for recovery of joint possession, on the ground that the defendant had acquired no valid title by his purchase. This suit was withdrawn, and liberty was reserved to the plaintiff to bring a fresh suit on the same cause of action. On the 8th August 1905, the plaintiff commenced the present action for joint possession of the land, substantially on the ground that the tenancy was non-transferable, that the defendant had acquired no valid title to the land, and that the plaintiff as co-owner to the extent of a half share was entitled to joint possession. No suggestion appears to have been made in the plaint that the leasehold interest was not heritable by custom or otherwise. The defendant resisted the claim substantially on the ground that the leasehold interest was transferable; that he had acquired a valid title to the land; and that, even if it was assumed that his purchase was not valid, he was entitled as joint owner to continue in sole occupation of the land which he had improved at considerable expense. The Court of first instance held that, as the tenancy had been created after the Transfer of Property Act, it was *primâ facie* transferable; that the plaintiff had not proved any custom or contract to the contrary; but that it was not heritable, as section 108 of the Transfer of Property Act did not make tenancies heritable. In this view, the Court held that the defendant had not acquired any title by his purchase. The Court, however, declined to

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make any decree for ejectment, on the ground that the defendant had improved the land and erected structures on it, and as the plaintiff had acquiesced in the acts of the defendant, she was entitled to get only fair and equitable rent. The plaintiff then appealed against this decision, and the defendant preferred a cross appeal. The District Judge held that the tenancy was not heritable and did not express any opinion upon the question whether the plaintiff had proved that the tenancy was not transferable by custom or contract. He then went on to hold that the doctrine of acquiescence had no application, and that there were no equitable grounds to justify the sole occupation of the land by the defendant as co-owner. In this view he allowed the appeal of the plaintiff, dismissed the cross-appeal, and made a decree for ejectment. The first defendant has now appealed to this Court, and on his behalf the decree of the District Judge has been assailed on three grounds, namely, *first*, that the holding was heritable; *secondly*, that it was transferable; and, *thirdly*, that there was no ouster of the plaintiff and the defendant was entitled to continue in occupation.

In support of the first ground, reliance has been placed upon the case of *Tej Chund v. Sri Kanth Ghose* (1), and it has been broadly contended that a leasehold interest is an interest in land and is consequently heritable. In reply, it has been contended that a leasehold interest in this country is not necessarily heritable, and in illustration of this statement reference has been made to the cases of *Vaman Shripad v. Maki* (2), *Rajaram v. Narasinga* (3) and *Narsingh Dyal Sahu v. Ram Narain Singh* (4). In our opinion the proposition that a leasehold interest must be heritable, because it is an interest in land, is too broad and requires to be qualified. In the case of *Tej Chund v. Sri Kanth Ghose* (1), it was ruled by the Judicial Committee that a lease for a fixed term is not terminated by the death of the lessee. To the same effect is the decision in *Burdakanth Roy v. Aluk Munjooree Dasiah* (5). These cases, as

(1) (1844) 3 Moo. I. A. 261.

(3) (1891) I. L. R. 15 Mad. 199.

(2) (1879) I. L. R. 4 Bom. 424.

(4) (1903) I. L. R. 30 Calc. 883.

(5) (1848) 4 Moo. I. A. 321.

pointed out in *Badrinath v. Bhajan Lal* (1), are authorities for the principle that in the absence of words to the contrary, a lease for a fixed term of years does not terminate before the expiry of the stipulated term by the mere fact of the death of either the lessor or the lessee. The same view was expressly recognised by the Judicial Committee in *Gobind Lal Roy v. Hemendra Narain Roy Chowdhry* (2). On the other hand, the terms of the grant or the nature of the interest created may plainly indicate that the tenancy is not intended to continue beyond the lifetime of the grantee. To this class belong the three decisions upon which reliance is placed by the respondents. The true test to apply is, as stated by Mr. Justice Woods in *Alsup v. Banks* (3), to determine from the terms of the grant, or from the nature of the tenancy, whether the parties intended that the execution of the contract was to be contingent upon the continued existence of both or either of them. In the case before us, the lease was clearly for building and residential purposes. It cannot be supposed to have occurred to the parties that such a lease would terminate upon the death of the lessee, who would have to spend considerable sums for the improvement of the land and for the erection of a suitable residence thereon. The lease, therefore, in such a case, cannot reasonably be assumed to fall within the small class of purely personal contracts contemplated by section 37 of the Indian Contract Act. As observed by Mr. Justice Willes in *Farrow v. Wilson* (4), generally speaking contracts bind the executor or administrator though not named; where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and in respect of service after the death, the contract is dissolved unless there be a stipulation, express or implied, to the contrary. It is not necessary for us to consider how far the covenants in a lease, when there is a devolution by the death of the original lessee, is binding upon the representatives of the latter: Woodfall on

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(1) (1882) I. L. R. 5 All. 191.

(3) (1891) 68 Miss. 664; 9 South. 985

(2) (1889) I. L. R. 17 Calc. 686.

(4) (1869) L. R. 4 C. P. 744.

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Landlord and Tenant, Chapter VII, Section 13 (b). It is sufficient for us to hold that in the case of a tenancy of the description now before us, the leasehold interest is heritable, and we are fortified in this view by the circumstance that in the plaint no suggestion was made that the tenancy terminated upon the death of the original tenant. Relief was asked on the ground that the tenancy was not transferable, and it was not till the case came on for trial in the Court of first instance that the suggestion was made that the tenancy was not heritable. This view was founded on the ground that section 108 of the Transfer of Property Act does not make leasehold interests heritable. This reasoning is manifestly fallacious. The Transfer of Property Act merely defines and amends certain parts of the law relating to the Transfer of Property by act of parties, and even in these respects it does not purport to be a complete code, much less does it deal with cases of succession. The inference, therefore, follows that the tenancy in this case was heritable, and we may add that this view is supported by the rule of English Law that a tenancy does not determine by the death of the lessee, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit. Thus in *Parker v. Constable* (1), which was treated in *Wilkinson v. Calvert* (2) as a case of great authority, it was ruled that half an year's notice must be given to a tenant-at-will or his executor to quit, or ejectment does not lie. To the same effect are the decisions in *Mackay v. Mackreth* (3), *Doe v. Porter* (4), *Doe v. Wood* (5), which were all cases of tenants from year to year: see also the observations of Lord Eldon L. C., in *James v. Dean* (6). We need hardly add that we are not in this case concerned with agricultural tenancies which in this country stand on an entirely different footing: *Lakhan Narain Das v. Jainath Panday* (7). The first ground urged on behalf of the appellant must therefore prevail.

(1) (1769) 3 Wilson 25.

(2) (1878) 3 C. P. D. 360.

(3) (1785) 4 Douglas 213.

(4) (1789) 3 T. R. 13; 1 R. R. 626.

(5) (1845) 14 M. & W. 682;
69 R. R. 781.

(6) (1805) 11 Ves. 383; 8 R. R. 178.

(7) (1907) I. L. R. 34 Calc. 516.

The second ground urged on behalf of the appellant raises the question of transferability. As the tenancy is non-agricultural and was created after the Transfer of Property Act, it is governed by the provisions of that Act, and is consequently *prima facie* transferable under section 108, clause (j). The sole question is whether the plaintiff has established any custom or contract to the contrary. The Court of first instance found upon this question against the plaintiff. The Appellate Court has not come to any determination thereon. It is open to this Court, however, under section 103 of the Code of 1908, to determine this issue of fact upon the evidence on the record ; we have accordingly examined the evidence, and we are satisfied that the conclusion of the Court of first instance is correct. It follows, therefore, that upon the death of Rajani Kumar, the tenancy devolved upon his infant sons, and upon transfer by their guardian on their behalf, the defendant became the holder of the tenancy on the 25th February 1901. He cannot obviously be treated as a trespasser. It is needless to determine precisely the incidents of the tenancy, for whether it is permanent or terminable, there is no suggestion that it has been terminated. In this view, the second ground must be answered in favour of the appellant, and the third ground does not, therefore, require consideration.

The result is that this appeal is allowed, the decrees of both the Courts below discharged, and the suit dismissed with costs in all the Courts.

Appeal allowed.

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CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carabuff.

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Feb. 18.

SARAT CHANDRA MUKERJEE

v.

THE CORPORATION OF CALCUTTA.*

*Calcutta Municipal Act (Beng. III of 1899), ss. 341 (1), 450 (3), 574 (c), 631—
Notice to remove fixture—Disobedience of requisition—Application by General
Committee to Magistrate for removal of fixture—Criminal prosecution for
offence not instituted—Limitation of time for Criminal prosecution.*

Section 631 of the Calcutta Municipal Act applies only to a criminal prosecution instituted against a person under s. 574 (c) for non-compliance with a requisition under s. 341 (1) in the regular way, that is, on complaint as defined in s. 4 of the Criminal Procedure Code, and not to a proceeding taken under s. 450 (3) by the Magistrate on the application of the General Committee in respect of such non-compliance.

The petitioner was the owner of the premises 137 Corporation Street, Calcutta, in front of which there was a strip of land, about 72 feet long and 2 feet 6 inches broad, claimed by him as his own, and by the Corporation as appertaining to the public street. It appeared that in 1903 he erected on this land a masonry platform attached to the building so as to form part of it. In January 1907 a written notice under section 341 (1) of the Calcutta Municipal Act was issued by the General Committee against him directing the removal, within the period fixed, of the platform, on the ground of its being an encroachment on the public road. The petitioner not having complied with the requisition contained in the notice, a proceeding under section 450 (3) was, on the application of the General Committee, instituted by the Municipal Magistrate against him in October 1907, but it was subsequently stayed at the instance of the Corporation, and not heard before August 1909. On the 30th October the Magistrate holding that the platform

*Criminal Revision, No. 1479 of 1909, against the order of Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated Oct. 30, 1909.

was an encroachment on the public street, ordered its demolition. The petitioner, thereupon, obtained the present Rule.

Babu Manmatha Nath Mookerjee, for the petitioner.

Mr. Stokes and Babu Debendra Chandra Mallick, for the Corporation.

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STEPHEN AND CARNDUFF JJ. This case arises under the Calcutta Municipal Act, 1899, and the effect of the sections of that Act that we are concerned with is as follows.

By section 341 (1), where any fixture has been attached to a building and causes an encroachment over any public street, the General Committee may require the owner or occupier to remove it. By section 450 (3) if, within the time prescribed in the notice, the fixture is not duly removed, the General Committee may apply to a Magistrate, and he may make an order directing that the fixture be demolished by the Chairman at the expense of the owner. By section 574 (3), whoever fails to comply with any requisition lawfully made upon him under section 341, among others, "shall be punished with a fine which may extend to two hundred rupees."

By section 631 "no person shall be liable to punishment for any offence against this Act . . . unless complaint of such offence is made before a Magistrate within three months. . . next after the commission of such offence."

What happened in this case is as follows. In January, 1907, a notice under section 341 was served upon the petitioner calling on him to remove a fixture which was alleged to be an encroachment on a public street. In October, 1907, proceedings were instituted against the petitioner under section 450. On the 30th October, 1909, the Municipal Magistrate found that a fixture had been attached to the petitioner's house so as to cause an encroachment on a public street, and under section 450 (b) he directed that the fixture should be demolished by the Chairman at the expense of the owner, that is the petitioner.

We have granted a Rule on the Magistrate to show cause why the order should not be set aside on the ground that the proceeding was barred by section 631.

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The point that the petitioner has sought to establish is that he has been made liable to punishment for an offence against the Act. His argument is as follows. The petitioner failed to comply with a requisition lawfully made on him under section 341 of the Act, within the meaning of section 574, and thereby made himself liable to a penalty of two hundred rupees. The application under section 450 was a complaint, and the Magistrate could either have punished him under section 574 which he did not, or made an order under section 450 which he did. But, as he was liable to punishment, the proceeding was subject to the limitation provided in section 631. This argument is not one to which we can assent. Section 574 may make non-compliance with a requisition under section 341 (1) an offence; but, if it does, the offence must be tried according to law in the regular way, that is on a complaint, which in this case would be such a complaint as is mentioned in section 4 of the Criminal Procedure Code. No steps were taken to this end in the present case, and, therefore, section 631 has no application. What was done was that the special remedy provided by section 450 was applied; but there is no necessary connection between that remedy and the punishment of an offence. The two things are quite distinct, and are so from the beginning; the limitation in section 631 applies to the one and not to the other. The result is that this Rule is discharged.

Rule discharged.

E. H. M

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Woodroffe.*

OFFICIAL TRUSTEE OF BENGAL

v.

KUMUDINI DASÍ.*

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Jan 24.

*Probate—Testamentary and Intestate Jurisdiction—Revocation—Probate and
Administration Act (VI of 1881) s. 50—Official Trustee of Bengal—Official
Trustee's Act (XVII of 1864).*

Where a Judge exercising the original testamentary and intestate jurisdiction of the High Court granted probate to the Official Trustee of Bengal, the probate being expressed to be granted to the Official Trustee of Bengal for the time being, assuming the order to have been erroneous, it cannot be said that the Judge acted without jurisdiction so as to bring the matter within the scope of section 50 of the Probate and Administration Act.

APPEAL by the Official Trustee of Bengal from an order of Fletcher J.

On the 12th September 1907, Manick Lal Seal, a Hindu governed by the Bengal school of Hindu Law, died, leaving him surviving his sole widow, Sreemati Kumudini Dasi, and an infant son, Monohur Lal Seal, aged four years, and possessed of considerable properties, moveable and immoveable, situate both within and without the jurisdiction of the High Court.

On the 7th June 1907, Manick Lal Seal had made and published his last will giving various directions for the benefit of his wife, his son who was to be the residuary legatee, and others, and establishing various trusts, charitable and otherwise. The material portions of his will, so far as the present matter is concerned, were as follows: "I desire that the Court of Wards should take charge of my estate, and it is my respectful prayer to Government that the Court of Wards may be empowered to take charge of my estate I desire that the funds for all the charities above named remain with the Official Trustee . . . I desire, as I have already

*Appeal from Original order, No. 4 of 1910.

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stated, that the Court of Wards should take charge of my estate and carry out the provisions of my will. If it does not, and only if it does not, then I desire that the Official Trustee of Bengal shall do so. And I appoint the said Official Trustee executor of this my will, or failing him the Administrator General of Bengal."

On the death of the testator the Court of Wards was requested by the widow to assume charge of the estate, but it was doubtful whether the Court of Wards would consent to do so.

On the 1st October 1907 Mr. C. E. Grey, who was at the time officiating as Official Trustee of Bengal, and had been so officiating for some time previous to the death of the testator, expressed his intention of renouncing probate. Thereupon, the Administrator General of Bengal applied to the High Court in its Testamentary and Intestate Jurisdiction for grant of probate. The widow, Kumudini Dasi, entered a caveat.

The application of the Administrator General of Bengal came on for hearing before Chitty J. on the 4th October 1907, when Mr. C. E. Grey, officiating Official Trustee of Bengal, withdrew his renunciation. The matter was adjourned till the 28th October, on which date an application was made by the Official Trustee of Bengal for grant of probate, the petition being verified by Mr. Grey.

The matter was again adjourned till the 18th November 1907, when it came on for hearing before Chitty J. The Official Trustee's application was consented to by the Court of Wards, and by the widow, the latter expressing her willingness to withdraw her caveat, if grant of probate were made to the Official Trustee. The application was resisted by the Administrator General of Bengal, who claimed that the grant should be made to him. On the 18th November 1907, Chitty J. made an order directing that the petition of the Administrator General, dated the 4th October 1907, praying for grant of probate be withdrawn, and that probate of the will of Manick Lal Seal be granted to the Official Trustee of Bengal (1).

Probate was accordingly issued on the 6th December 1907 to the Official Trustee of Bengal by the name of his office : it was expressed to be granted to the Official Trustee of Bengal for the time being. Between the date of Chitty J.'s order of the 18th November 1907 and the actual issue of probate on the 6th December, Mr. A. B. Miller, the permanent incumbent of the office of Official Trustee of Bengal returned to duty and resumed charge of the office.

By virtue of the grant of probate, the Official Trustee took possession of and administered the estate of the testator as executor under the will. In the month of March 1909, Mr. Miller again proceeded on leave, returning to duty early in December of the same year. During his absence Mr. Grey again officiated for him as Official Trustee, and as such took possession of and administered the estate of the testator.

On the 27th July 1909, Kumudini Dasi presented her petition praying for the revocation or annulment of the grant of probate to the Official Trustee of Bengal, and for the issue of letters of administration with copy of the will annexed to herself during the minority of her infant son. She contended that the appointment of the Official Trustee of Bengal as executor under the will of the testator was not warranted by law, that the Official Trustee of Bengal was not authorised by law to accept probate, and that the grant of probate to the Official Trustee of Bengal was entirely without jurisdiction.

In an affidavit filed on the 12th August 1909, and made by Mr. Grey, it was alleged that the Official Trustee had long since realised the outstandings of the testator and paid all his debts so far as they had been ascertained. It was admitted, however, that there were two suits still pending : one, an administration suit by the widow, Kumudini Dasi, against the Official Trustee, instituted on the 8th December 1908, and the other a suit by the Official Trustee against Kumudini Dasi for the recovery of the sum of Rs. 1,00,000 which she was alleged to have appropriated from the estate and which she claimed as a gift made by her husband before his death.

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The widow's application for revocation or annulment of the grant of probate was directed to stand over till the return of Mr. Miller.

The application was heard on the 17th December 1909 by Fletcher J., who directed that the grant of probate of the will of Manick Lal Seal to the Official Trustee be revoked, and that the grant of probate issued to the Official Trustee of Bengal for the time being be brought into the Registry of the High Court. The judgment of his Lordship was as follows :—

FLETCHER J. This is an application by a lady of the name of Kumudini Dasi, widow of one Manick Lal Seal, calling upon the Official Trustee of Bengal to show cause why grant of probate of the will of Manick Lal Seal should not be revoked or cancelled, and why letters of administration should not be granted to her.

The facts stated shortly are as follows :

Manick Lal Seal died on the 12th September 1907. By his will, dated the 7th June 1907, he desired in the first place that the Court of Wards should take charge of his estate and carry out the provisions of his will, and if it did not do so, and only in that case, he desired that the Official Trustee of Bengal should do so, and he appointed the Official Trustee of Bengal executor of his will, failing him the Administrator General of Bengal.

An application was made to the Court after the death of Manick Lal Seal, which occurred, as I have already said, on the 12th September 1907 for grant of probate of the will to the Official Trustee of Bengal. The petition to the Court was presented by Mr. Grey, the petitioner being stated to be the Official Trustee of Bengal. The verification of the petition shows that the application was presented by Mr. Grey, who was then officiating as Official Trustee whilst Mr. Miller was on leave.

The matter came on before Mr. Justice Chitty in Chambers on the 18th November 1907. Mr. Justice Chitty directed that probate should issue to the Official Trustee of Bengal for the time being as prayed in the petition.

The probate of the will was accordingly issued to the Official Trustee for the time being. The probate annexed to the certified copy of the will shows in fact that a grant was so made.

The present application is by the widow to have the probate revoked on the ground that the Court had no jurisdiction to make that grant. Under the Official Trustee's Act (Act XVII of 1864) which regulates, if it does not constitute, the office of the Official Trustee, the duties of the Official Trustee are limited and defined. I cannot on reading the sections of the Act have any doubt as to what the duties conferred by the statute are.

Section 8 provides that the Official Trustee may be appointed as an original Trustee of any deed to which he had been so appointed with his consent in the words of that section. Section 10 provides that where the property is already subject to a trust (not where the property is about to be made the subject of a trust), and where there is no trustee willing to act or capable of acting in the

trust thereof, the Official Trustee may be appointed in the room of such trustees or trustee. Those words are familiar to any one who has had to do with the appointment of new trustees, and they occur in every English Trustee Act from 1850.

It is obvious to my mind that section 10 applies to a case where there is a desire to appoint the Official Trustee in the place of an original trustee. It matters not whether the trust arises by deed or will.

These, in my opinion, are the only trusts which the Official Trustee is entitled to accept *qua* Official Trustee. An attempt was made to rely upon the subsequent sections of the Act relating to the investment of trust funds, and re-transfer of trust funds to the original or subsequently appointed trustee. Mr. Hill has argued that these sections show that the Official Trustee had power to act as original trustee of a will, and that being so, he has power to accept an executorship. To neither of these propositions of Mr. Hill's am I able to assent. In my opinion there is nothing in the Act to authorise the Official Trustee to be appointed an original trustee of a will and with regard to executorships, not only is there nothing to authorise the Official Trustee to accept such offices, but the legislature has thought fit to constitute a special officer to accept such duties.

Mr. Justice Chitty considered that as there was no provision in the Official Trustee's Act prohibiting him from accepting an executorship he was at liberty to do so. With the greatest respect for the learned Judge, I am wholly unable to agree with his decision on this point.

The decision of the learned Judge on this point is contrary to a whole string of decisions commencing with *Ashbury Railway Carriage and Iron Company v. Riche* (1), which expressly laid down that where a body is created by statute, that body has only the powers given to it by statute and cannot exercise any other power, although not expressly prohibited from doing so. Under the Official Trustee's Act the Official Trustee has power only to accept the trusteeships authorized by sections 8 and 10 of the Act only. These two sections do not authorise the Official Trustee to accept an executorship.

The only point that has been at all seriously argued before me is whether this matter having been dealt with by Mr. Justice Chitty, the probate is capable of being revoked under section 50 of the Probate and Administration Act.

The decision of the learned Judge in granting the probate being a judgment *in rem* is binding and can only be revoked for what is defined as "just cause" in section 50 of the Probate and Administration Act. Unless it can be shown that there is "just cause," the grant is binding, however much one may disagree with the reasons upon which the learned Judge founded his decision.

"Just cause" is defined in section 50 as including the case where the proceedings to obtain the grant of probate are defective in substance, and the first illustration to the section shows that, where the Court has no jurisdiction, probate can be revoked. It was argued by Mr. Mitter on behalf of the Official Trustee that this applies only to the case where the Court has either no local or territorial jurisdiction. In my opinion the section cannot be limited in that way. In going through the Probate and Administration Act, it will be noticed that the Act places certain limits on the powers of the Court.

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The first of such limits is in section 6, which provides that probate can be granted only to an executor named in the will. That clearly implies that the Court has no jurisdiction to grant probate to a person other than an executor named in the will. An executor is defined in section 3 as a person to whom the execution of the last will is committed by the testator.

The Court must also pay attention to statutory provisions contained in other Acts, and if the Official Trustee *qua* Official Trustee accept an executorship, the Court cannot give itself jurisdiction to appoint the Official Trustee *qua* Official Trustee executor.

I think, therefore, the learned Judge had no jurisdiction to grant the probate now sought to be revoked on two grounds : *First*, that the Official Trustee is not capable of being appointed executor ; and, *second*, that the learned Judge had no jurisdiction in so far as he directed the grant to issue to the Official Trustee for the time being. The will having appointed the Official Trustee to be the executor, I know of no authority for making a grant in the terms in which the present grant was made, and the grant is clearly not to the person named in the will as executor.

On both these grounds I am of opinion that the Court had no jurisdiction to make the grant to the Official Trustee for the time being. Then it has been argued that the widow is bound by acquiescence on her part, but no consent on her part could give the Court jurisdiction to make a grant of probate which the Court had no jurisdiction to make. I am, therefore, of opinion that she is not estopped from applying that the probate granted should be revoked. There only remains the question of costs to be dealt with. I have no jurisdiction sitting here as a Judge of a Probate Court to order the costs to come out of the estate. I, therefore, make no order as to costs.

On the second part of the application, asking that the widow may have granted to her letters of administration with a copy of the will annexed, I make no order.

From this order the Official Trustee of Bengal appealed.

Mr. B. C. Mitter (with him *Mr. Pugh*), for the appellant. Assuming that Fletcher J. was right in his contention that the Official Trustee of Bengal was not capable of being appointed executor, and, secondly, that grant of probate cannot be issued to the Official Trustee for the time being, still Fletcher J. was not competent to set aside as a nullity an order granting probate passed by Chitty J., a judge exercising co-ordinate jurisdiction. Fletcher J. relied on section 50, illustration (a), of the Probate and Administration Act, and came to the conclusion that Chitty J. had no jurisdiction to make the grant. Now an illustration cannot be relied on to militate against the words of a section. The 5th clause shows what is the meaning

of section 50. In *Craster v. Thomas* (1), Neville J. pointed out that it was clear from the 5th clause that the grant was valid until recalled. My main contention is that no question of jurisdiction arises. Chitty J. decided on an issue raised, that the Official Trustee was a "person" within the meaning of the Probate and Administration Act. It was not a question of want of jurisdiction: if anything, the order was erroneous: *Sardarmal v. Aranvayal Sabhapathy* (2). The order was valid and binding on all Courts of co-ordinate jurisdiction.

[JENKINS C.J. You rely on the proposition that every Court has jurisdiction to decide a case erroneously.] Yes.

[WOODROFFE J. The question is, whether the Court had jurisdiction over the subject matter of the application.] Yes. Chitty J. presiding over an original Court of testamentary and intestate jurisdiction clearly had such jurisdiction.

[JENKINS C.J. What would you say of a grant of probate to a lunatic or a minor?]

If the Court adjudicated on the point and made a grant, the order would be valid.

[JENKINS C.J. The authorities lay down that an erroneous assumption of jurisdiction does not give a Court jurisdiction; but I do not see how the present matter involves a question of jurisdiction at all.]

On the second point, the grant of probate was made to the Official Trustee; the order, as drawn up, was in favour of the Official Trustee for the time being.

[JENKINS C.J. A grant of probate to a corporation sole enures only for the benefit of the person to whom the grant was made. Moreover, how can the Official Trustee be presumed to be a corporation sole?]

If the Official Trustee is entitled to apply, and did so apply, the Court will not consider who was the particular officer who applied or to whom grant was made: *In the goods of William Haynes*, (3). The executor will be the Official Trustee for the time being.

(1) [1909] 2 Ch. 348.

(2) (1896) L. L. R. 21 Bom. 205, 211.

(3) (1842) 3 Curt. 75.

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Mr. Pugh (following). It was decided in *In the goods of William Haynes* (1) that probate may be granted to a corporation sole. Now, in his judgment *Chitty J.* held that the Official Trustee was in the position of a corporation sole as under the old Common Law. The proper remedy of the widow lay by way of appeal. The revocation of the grant to the Official Trustee would cause great inconvenience to the estate; for a space of three years the estate had been administered by the Official Trustee.

Mr. Sircar (with him *Mr. C. C. Ghose*), for the respondent. The Official Trustee is not a "person" within the meaning of the Probate and Administration Act. He cannot be appointed executor or obtain grant of probate. If the Official Trustee is a corporation sole at all, he is such a corporation regulated by, and his powers are limited by, the Official Trustee's Act: *Baroness Wenlock v. River Dee Company* (2), *The Conservators of the River Tone v. Ash* (3). The Official Trustee's Act does not empower the Official Trustee to act as executor; if he does, he does so outside the Act, and then he ceases to be a corporation.

[JENKINS C.J. The Official Trustee's Act seems to constitute an *office* rather than a *corporation*.]

It is submitted that inasmuch as the Official Trustee is not entitled in law to obtain grant of probate, *Chitty J.* had no jurisdiction to make the grant. A Court can pass judgment only upon a matter which it has authority to decide: *Sukh Lal Sheikh v. Tara Chand Ta* (4), *Nusserwanjee Pestonjee v. Meer Mymoodeen Khan* (5). The way to invoke the jurisdiction of the Court to obtain a grant of probate was on the application of a "person."

The test, whether a proceeding is an irregularity or a nullity, is to see whether the party can waive the objection: *Ashutosh Sikdar v. Behari Lal Kirtania* (6). Here the proceedings were *in rem* and the widow could not waive the objection. They

(1) (1842) 3 Curt. 75.

(2) (1887) L. R. 36 Ch. D. 674, 635n

(3) (1829) 10 B. & C. 349, 383.

(4) (1905) I. L. R. 33 Calc. 68, 71.

(5) (1855) 6 Moo. I. A. 134, 155.

(6) (1907) I. L. R. 35 Calc. 61, 73.

were a nullity : *Allan v. Dundas* (1) and *Prosser v. Wagner* (2) were also referred to.

Mr. B. C. Mitter, in reply, cited *Malkarjun v. Narhari* ().

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JENKINS C.J. This is an appeal from the Original Side of this Court in the Testamentary and Intestate Jurisdiction, the judgment complained of being one passed by Mr. Justice Fletcher, who directed that the grant of probate of the will of one Manick Lal Seal, deceased, to the Official Trustee be revoked, and that the grant of probate issued to the Official Trustee of Bengal for the time being be brought into the Registry of this Court. There is no dispute as to the facts, and the only question is whether this is a case where the Court, under section 50 of the Probate and Administration Act, ought to revoke the probate that has been granted. This probate was granted by Mr. Justice Chitty on the 18th of November 1907, his order being that probate of the will be granted to the Official Trustee of Bengal : the probate actually granted was expressed to the Official Trustee of Bengal for the time being. At the time when the application was made Mr. Grey was Official Trustee, but he was merely officiating temporarily in the place of Mr. Miller the permanent incumbent. The ground on which Mr. Justice Fletcher has revoked this grant of probate was that Mr. Justice Chitty had no jurisdiction to grant the probate now sought to be revoked : *first*, because the Official Trustee is not capable of being appointed executor ; and, *secondly*, because the learned Judge had no jurisdiction, in so far as he directed the grant to issue to the Official Trustee for the time being.

It has not been contended before us that Mr. Justice Fletcher's view of the law is not correct, and, speaking for myself, I am glad that he has raised this point. I think, however, the appeal must succeed on the ground that, although Mr. Justice Chitty's order may have been erroneous on the ground stated, it cannot be said that he had no jurisdiction to make

(1) (1789) 3 T. R. 125.

(2) (1856) 1 C. B. N. S. 289.

(3) (1900) I. L. R. 25 Bom. 337 ;

L. R. 27 I. A. 216.

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the order. It has become a commonplace that it is within the jurisdiction and competency of the Court to decide wrongly as well as to decide rightly, so that, even if it be assumed for the purpose of this case that Mr. Justice Chitty took an erroneous view of the position of the Official Trustee under the Official Trustee's Act, it cannot, in my opinion, be said that he made an order as to which he had no jurisdiction. Reading the judgment of Mr. Justice Chitty, I have little doubt that he regarded the Official Trustee as a *corporation sole*, represented by the incumbent for the time being. He therefore regarded the Official Trustee as a person who could be appointed as executor within the meaning of the Probate and Administration Act. Further than that, he obviously was of opinion that there was nothing in the Official Trustee's Act which precluded his becoming an executor of a will. However erroneous that decision may have been—and it is assumed for the present purpose that it is erroneous—still it was a decision to which the learned Judge was entitled to come. He was the Judge at that time exercising the testamentary jurisdiction of the Court in its Original Side, and the subject matter then before him was clearly one with which he was in every way competent to deal. There was, therefore, no defect in respect of subject matter, or parties, or the nature of the proceeding, so that I am of opinion that the case does not fall within section 50 of the Probate and Administration Act. Further, I think this is not a case where it would be convenient to exercise the power of revocation and annulment given by section 50 of the Probate and Administration Act to the Court. The estate is one of very considerable value: probate was granted as far back as November 1907, and we are told, and it is not disputed, that during the three years that have elapsed since the grant of probate many transactions have taken place, so that serious questions might possibly arise, notwithstanding the saving provision of section 84 of the Act, were the grant now to be cancelled.

The result then is that, even assuming the order of Mr. Justice Chitty to have been erroneous, I still think that the order for revocation should be set aside.

I notice that Mr. Justice Chitty, in the course of his judgment in *In the Goods of Manick Lal Seal* (1), points out that if the Official Trustee takes up the executorship, he will receive no remuneration for that portion of the duties, but only under the Official Trustee's Act, for his management as trustee: and it has been stated before us that no remuneration is claimed, or will be claimed, in respect of the executorship. I must point out that it was not competent for the learned Judge to express any opinion as to the right of the Official Trustee to remuneration—as trustee—for that was obviously not a matter before him. My reason for alluding to that remark is to safeguard myself against being supposed to have assented to the view that this Court in its testamentary jurisdiction can come to any decision as to the right of the Official Trustee to remuneration as a trustee, or even as to his capacity to take up the trusteeship.

The appeal must therefore succeed. The order of Mr. Justice Fletcher must be set aside. The respondent must pay the appellant's costs both in this Court and in the Court of first instance without prejudice to the right of the latter to have the costs to be paid out of the estate. We direct that probate be re-issued.

WOODROFFE J. I agree that the order of the learned Judge should be set aside. In this case the Official Trustee applied for probate as being a person appointed by the will of the testator, and the application was made to a Court having probate jurisdiction. It is admitted that the Court had jurisdiction over the subject-matter, that is the grant of probate. The question then to be decided was whether the Official Trustee was a person entitled to apply for such probate. This was not a question of jurisdiction, but was one of the questions which a Court possessing probate jurisdiction had to determine during the course of its exercise. If Mr. Justice Chitty had not jurisdiction to decide this point, what Court had? There was no defect, therefore, in the proceedings within the meaning of

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section 50 of the Probate and Administration Act. Whether the decision on the question as to the right of the Official Trustee to obtain probate was a right or a wrong decision does not concern us, but having been given, it was binding on a court of co-ordinate jurisdiction. Further, the Court has discretion under section 50 of the Probate and Administration Act to revoke or annul the grant of probate. No doubt there are cases where a Court which is given a discretion by the statute is bound under the circumstances of the case to exercise that discretion in the applicant's favour ; but this is not the case here. This is a case where revocation was likely to cause the greatest inconvenience, for we are informed that the administration having gone on for several years has nearly come to an end. It would, therefore, be disastrous at such a stage to reopen all that had been meanwhile done under an order to which the present respondent was a consenting party. Such consent may not give jurisdiction : but it is a circumstance which may be, and should be, considered on the question whether the Court should exercise its discretion at the instance of such party and declare that there had been no jurisdiction.

Appeal allowed.

J. C.

Attorneys for the appellant : *B. N. Basu & Co.*

Attorney for the respondent : *N. C. Gupta.*

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

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Feb. 17.

Power-of-attorney—Omission of name of mukhtiar in the power, by mistake—Amendment of mistake by Court by allowing fresh power to be filed—Inherent jurisdiction of Court to allow amendment of mistake—Effect of amendment as to limitation—Civil Procedure Code (V of 1908) ss. 36, 37—Rules and Circular Orders, Ch. XI, Art. 34.

Where there is no doubt as to the fact that the *mukhtiar* who filed an application for execution had in fact authority from the decree-holder to do so, and that his name was omitted by mistake from the power-of attorney, the Court may, in its discretion, allow the power to be amended, upon proper application by the decree-holder for the insertion of the name of the attorney.

If such amendment is allowed, it takes effect from the date when the power-of-attorney was originally filed.

SECOND APPEAL by the decree-holder.

This appeal arose out of an application for execution of a decree. The application was made on the 29th June 1908. It was presented by a *mukhtiar*, Gopi Nath. The *mukhtiar-nama*, however, had not in its body, by mistake, the name of the *mukhtiar* who signed at the back. This formal defect was allowed to be rectified by the Subordinate Judge, and a properly executed *mukhtiarnama* was filed on the 10th September 1908. The judgment-debtor objected that the application for execution was barred by limitation, as the date of the application must be taken to be the date when the properly executed *mukhtiarnama* was filed. The Subordinate Judge overruled this objection. Meanwhile, the pleader, who appeared for the decree-holder in the original suit, also accepted the power filed

*Appeal from Appellate Order No. 306 of 1909, against the order of W. N. Delevingne, District Judge of Hooghly, dated April 19, 1909, reversing the order of Surendra Nath Mitra, Subordinate Judge of Hooghly, dated Jan. 2, 1909.

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by Gopi Nath. He also signed the application for execution, by order of Court, on the 2nd January 1909, the date on which the application was granted by the Subordinate Judge. The judgment-debtors appealed to the District Judge. He decreed the appeal. According to him, the application for execution being filed by a *mukhtiar* who had no authority to appear for the decree-holder, and the properly executed power presented being clearly out of time, the application was barred. He also held that the subsequent acceptance of the power and application by the pleader who appeared for the decree-holder in the original suit could not validate the proceedings.

The decree-holder thereupon preferred this second appeal.

Babu Jadunath Kanjilal, for the appellant. The original *mukhtiarnama* was allowed to be amended by the Court by fresh power. The Court has inherent jurisdiction to allow amendment of mistakes. The application of 10th September should be held to date back to 29th June, or the latter application regarded an application for amendment. The judgment-debtor, moreover, never objected in the Court of first instance on this ground: see Civil Procedure Code, sections 36, 37 and 39 on the rules of procedure for powers and *mukhtiar*s. See also *Panchanan Singha Roy v. Dwarka Nath Roy* (1), *Hukum Chand Boid v. Kamalanand Singh* (2) on the inherent powers of Courts to amend mistakes, and also *Dhanpat Singh v. Lilanand Singh* (3), *Autoo Misree v. Bidhoomookhee Dabee* (4), and *Murari Lal v. Umrao Singh* (5). On the retrospective effect of amendments, see *Skinner v. Orde* (6), *Fuzloor Rukman v. Altaf Hossen* (7) and *Macgregor v. Tarini Churn Sircar* (8).

Babu Nagendranath Mitra, for the respondent, contended that where rules of procedure have been laid down by the Court, they must be strictly adhered to.

Cur. adv. vult.

(1) (1905) 3 C. L. J. 29.

(2) (1905) I. L. R. 33 Calc. 927.

(3) (1869) 2 B. L. R. App. 18.

(4) (1878) I. L. R. 4 Calc. 605.

(5) (1901) I. L. R. 23 All. 499.

(6) (1879) I. L. R. 2 All. 241.

(7) (1884) I. L. R. 10 Calc. 541.

(8) (1886) I. L. R. 14 Calc. 124.

MOOKERJEE AND TEUNON JJ. We are invited in this appeal to reverse an order of the District Judge by which he has dismissed an application for execution of a decree as barred by limitation.

The appellant obtained the decree on the 5th July 1905. On the 29th June 1908 she applied for execution. This application was presented by a *mukhtiar*, Gopi Nath, who signed on the back of the *mukhtiarnama* which was attached to the application. As a matter of fact, the body of the *mukhtiarnama* did not contain the name of this *mukhtiar*, and the case of the appellant throughout has been that the name was omitted by the mistake of the writer who drew up the power-of-attorney. The Officer of the Court who examined the application overlooked this defect, though he found out that the application was not in order, as the properties sought to be attached had been imperfectly described. On the 2nd July 1908, the application was returned to the "filing pleader" for amendment within seven days. The application was amended, and refiled on the 6th July following. It was thereupon registered, and notices were directed to be issued on the judgment-debtor under section 248 of the Civil Procedure Code. On the 5th August the judgment-debtor filed his objections. One of these was that the application was barred by limitation; another was that the person who had verified the application was not the duly authorised agent of the decree-holder; but no objection appears to have been expressly taken that the *mukhtiar* had not been duly empowered to file the application. It is not clear how the mistake was first discovered; but on the 10th September the decree-holder filed an application, in which it was stated that by an oversight the name of the *mukhtiar* had been omitted from the power-of-attorney, and along with it a properly executed *mukhtiarnama* in favour of Gopi Nath was filed. The Court directed this *mukhtiarnama* to be placed on the record.

At the hearing, it was objected that there was no application in accordance with law till the 10th September 1908, and that it was consequently barred by limitation; but the Subordinate

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Judge overruled this objection. It may be mentioned that the decree-holder anticipating the objection had, on the 19th September, got Dasarathi Ghosh, who had appeared in the original suit and appeal, to accept the power filed at first by Gopi Nath ; and on the 2nd January 1909 Dasarathi also signed the application for execution. The Subordinate Judge thought that this was sufficient to validate the proceedings and allowed execution to proceed. On appeal, the District Judge held that the proceedings were illegal ; the application for execution which had been originally signed by Gopi Nath was inoperative, because it was not till the 10th September that Gopi Nath had written authority to appear on behalf of the decree-holder, and the application treated as made on that day was obviously barred by limitation ; on the other hand, the application could not be validated by the subsequent signature of the pleader who had appeared in the original suit. In other words, according to the District Judge the application was inoperative, because it had been signed and presented by a *mukhtiar* who had no written authority at the time, and had not been signed by the pleader who might, at that time, have filed it. In this view the District Judge allowed the appeal and dismissed the application for execution.

The decree-holder has now appealed to this Court, and on her behalf it has been contended that in the events which had happened, the application ought to have been treated as within time ; that although the original *mukhtiarnama* did not contain the name of the *mukhtiar* who accepted it, it was open to the Court to allow the *mukhtiarnama* to be subsequently amended ; and that the application of the 10th September 1908 might, in substance, be treated as an application for such amendment. It has further been argued that as objection was not taken on this ground by the judgment-debtor, he must be taken to have waived it, and that in any event the Court had inherent power so to amend the proceedings as to do justice between the parties. These positions have been controverted on behalf of the respondent, and it has been broadly argued that the parties ought to be made strictly to adhere to the rules of procedure on the

subject. The question raised for our decision is one of some novelty, and is not altogether free from difficulty. But after careful consideration of the arguments addressed to us on both sides, we are of opinion that the contention of the appellant should prevail.

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Section 36 of the Civil Procedure Code of 1882 provides that any application or act required or authorised by law to be made or done by a party to a suit, may be made or done by his recognised agent or by a pleader duly appointed to act on his behalf. Section 39 provides that the appointment of a pleader shall be in writing, and such appointment shall be filed in Court. Section 37, which deals with recognised agents, specifies the classes of persons by whom appearances, applications, and acts may be made or done on behalf of the parties. The second clause of the section deals with certificated *mukhtiar*s, who, when holding special powers-of-attorney authorising them to do on behalf of their principals such acts as may legally be done by *mukhtiar*s, may appear or act. Under the rules of this Court, a certificated *mukhtiar* is authorised to file an application for execution (Rules and Circular Orders, Chapter XI, Article 34). Section 37 of the Code, however, does not define a power-of-attorney, nor is any definition given elsewhere in the Civil Procedure Code, or in the General Clauses Act.

A question might, perhaps, therefore arise as to whether a power-of-attorney, for purposes of section 37, must always be in writing; in other words, whether authority to act, when conferred upon a certificated *mukhtiar*, must be by a written instrument.

In England, it appears to have been ruled that written authority is not absolutely necessary, and that parol authority is sufficient: *Lord v. Kellet* (1). The case of *Wright v. Castle* (2) shows that an attorney who acts without a written authority may find himself in trouble if his client denies that he had authority to institute the proceedings; and Lord Eldon observed that a solicitor must furnish himself with an authority in writing (*Street on Equity Procedure*, Volume I, sections 570 and 641;

(1) (1835) 2 Myl. & K. 1.

(2) (1817) 3 Mer. 12; 36 E. R. 12.

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Gibson on Suits in Chancery, section 1174; Annual Practice, 1910, Volume II, page 436). In this country, it is undoubtedly the practice for *mukhtars* to file *mukhtairnamas*, and as it has not been argued that a power-of-attorney under section 37 may be by parol, we shall assume that it must be in writing; that is, that a power-of-attorney is an instrument by which the authority of an attorney in fact is set forth. This view receives some support from the case of *Walker v. Remmett* (1). If, therefore, written authority is essential, the question arises whether an application made by an attorney, whose name has by mistake been omitted from the power, can be validated by a subsequent amendment. In our opinion there is no reasonable doubt that the Court has inherent power to allow such amendment to be made, and that the amended power takes effect from the date when it was originally filed.

In the first place, it is clear upon the authorities that a Court has inherent power, in any particular case, to adopt such procedure as may be necessary to enable it to do that justice for the administration of which alone it exists: *Panchanan Singha Roy v. Dwarka Nath Roy* (2), *Hukum Chand Boid v. Kamalanand Singh* (3). As Mr. Justice Mahmood observed in *Narsingh Das v. Mangal Dubey* (4), 'the Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law.' This is of course subject to the qualification that, in the exercise of its inherent power, the Court must be careful to see that its decision is based on sound general principles, and is not in conflict with them or the intentions of the Legislature. A similar view was emphasised by Lord Penzance in *Kendall v. Hamilton* (5), where he observed that procedure is the machinery of the law after all, the channel and means whereby law is administered and justice reached; it strangely departs from its

(1) (1846) 2 C. B. 850; 69 R. R. 625.

(2) (1905) 3 C. L. J. 29.

(3) (1905) I. L. R. 33 Cal. 927.

(4) (1882) I. L. R. 5 All. 163.

(5) (1879) 4 App. Cas. 504, 525

proper office, when, in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern where it ought to subserve. Now there can be no room for controversy that the Code of Civil Procedure allows amendments to be made in judicial proceedings under various circumstances. No comprehensive formula can be framed to define precisely the power of a Court to allow such amendments to be made, but this much may be laid down as the cardinal rule, that the allowance of amendments must, in every stage of the case, rest with the discretion of the Court, and that discretion must depend largely on the special circumstances of each case. If a limit to amendments may be laid down, it is this : that they must not be allowed to prejudice the substantial rights of the party in favour of whose opponent the amendment is allowed, but observing due caution in that regard, the time and extent of each amendment are in the judicial discretion of the Court : *Hardin v. Boyd* (1), *Codington v. Maff* (2).

In a case like the present, where there is no doubt as to the fact that the *mukhtiar* who filed the application for execution had in fact authority from the decree-holder, and that his name was omitted by mistake from the power-of-attorney, it is, in our opinion, reasonable to hold that the Court may in its discretion allow the power to be amended upon proper application by the decree-holder for the insertion of the name of the attorney.

The view we take is supported by the case of *Pinde v. Norton* (3), where a mistake of a name in a warrant-of-attorney to suffer a common recovery was allowed to be amended : see also Comyn's Digest, 5th Edition, Volume I, page 746, tit. Attorney, and Bacon's Abridgment, 7th Edition, Volume I, page 404, tit. Attorney. The same view is borne out, to some extent, by the decisions in *Dhanpat Singh v. Lilanand Singh* (4), *Autoo Misree v. Bidhoomookhee Dabee* (5) and *Lakhmi Das v. Gobind Ram* (6), where want of authority in the person who presented

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(1) (1884) 113 U. S. 756.

(2) (1862) 14 N. J. Eq. 430 ;
82 Am. Dec. 258.

(3) (1554) Dyer, 105a.

(4) (1869) 2 B. L. R. App. 18.

(5) (1878) I. L. R. 4 Calc. 605.

(6) (1882) Punj. Record 105f.

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an application for execution was treated as a mere irregularity which could be waived, a view not inconsistent with that taken in *Murari Lal v. Umrao Singh* (1).

In the second place, it is reasonably clear that if such amendment is allowed, it takes effect from the date when the power-of-attorney was originally filed. It is not practicable to lay down any rule of universal application on the subject of the retro-active effect of amendments. There are cases, however, in which amendments have been allowed with retro-active effect ; for instance, when a plaint has been filed upon insufficient court fees, upon payment of deficit court fees, the suit must be taken to have been instituted on the day when the plaint was originally filed : *Skinner v. Orde* (2). In other cases of amendments also, for instance, amendments of applications for execution of decrees, the amended application has been treated, for purposes of limitation, as if it had been presented in its amended form on the original date : *Fuzloor Ruhman v. Altaf Hossen* (3), *Macgregor v. Tarini Churn Sircar* (4), *Jivat Dube v. Kali Charan Ram* (5), *Shama Prosad Ghose v. Taki Mullik* (6), which were not referred to in *Raghunatha Thaha Chariar v. Venkatesa Tawker* (7), where a different view was taken. In fact, when an amendment has been properly made, and the cause of action is not altered, the amended pleading may properly be regarded as a continuation of the original pleading and takes effect as of the date when the latter was filed. On these principles, we must hold that it was competent to the Court of first instance to allow the omission in the original power-of-attorney to be supplied, and that as soon as the defect was removed, the proceeding was validated from its inception.

The result, therefore, is that this appeal must be allowed, the order of the District Judge set aside, and that of the Court of first instance restored with costs throughout.

Appeal allowed.

B. M.

(1) (1901) I. L. R. 23 All. 499.

(2) (1879) I. L. R. 2 All. 241 ;
L. R. 6 I. A. 126.

(3) (1884) I. L. R. 10 Calc 541.

(4) (1886) I. L. R. 14 Calc. 124.

(5) (1896) I. L. R. 20 All. 478.

(6) (1901) 5 C. W. N. 816.

(7) (1902) I. L. R. 26 Mad. 101.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

RAJRANI DASSI

v.

GANESHPRASAD SRICHANDAN MAHAPATRA.*

1910
March 3.

Sale for Arrears of Revenue—Irregularity—Substantial Loss—Sale Notification, incorrect entry in—Notice—Beng. Act VII of 1868, ss. 8, 11—Beng. Act XI of 1859, s. 33.

An incorrect entry in a sale notification, resulting in misleading intending bidders, is an irregularity such as is contemplated by s. 33 of Beng. Act XI of 1859.

Deonandan Singh v. Manbodh Singh (1) discussed.

Though s. 8 of Beng. Act VII of 1868 prevents a plaintiff from proving any irregularity in the service of notice required by s. 11, yet it would not prevent him from proving that a notice in contravention of the provisions of that Act was served in a wrong mehal which in itself and by its service supported the conclusion that the mis-statement in the sale notification constituted a serious irregularity.

APPEAL by the defendants, Sreemati Rajrani Dassi and others.

This appeal arose out of a suit instituted by the plaintiffs, Ganeshprasad Srichandan Mahapatra and others, under section 33 of Act XI of 1859, for setting aside the sale of a taluq called Pachitira, held for arrears of Government revenue, on the 6th February 1905. The plaintiffs were defaulting proprietors of the taluq sold. They applied to the Commissioner of Orissa to have the sale set aside, but their appeal was rejected on the 3rd July 1905.

The plaintiffs based their case on the following grounds, *viz.*, (i) that by the notice issued before sale under section 6 of Act XI of 1859, the name of the proprietor of a different taluq was set forth as the owner of the taluq sold; (ii) that the notice issued under section 7 of the Act was never published in any village of the taluq sold, but published at Bhagra, comprised

* Appeal from Original Decree, No. 394 of 1907, against the decree of Jogendra Nath Mukerjee, Subordinate Judge of Cuttack, dated Aug. 5, 1907.

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in the taluq held by the proprietor whose name was wrongly marked in the office notice as the owner of the taluq sold ; (iii) that the value of the taluq sold was Rs. 6,000, but the price obtained at the sale was only Rs. 1,000 : and they contended that they had suffered substantial injury by reason of that irregularity. The taluq was purchased by the sixth defendant, Ram Prasad Jena, who was the agent of the fifth defendant, Raja Baikuntha Nath Dey Bahadur, but eventually it was purchased by the defendants (the appellants) who had their names registered under Act VII of 1876.

The Subordinate Judge, on the 5th August 1907, decreed the plaintiffs' suit and set aside the sale of the taluq, holding that the sale in question was held contrary to the provisions of the Revenue-sale Law, and that in consequence the plaintiffs had sustained substantial loss by reason of such sale. From this order the defendants appealed to the High Court.

Babu Pravash Chandra Mitra and *Tarit Mohan Das*, for the appellants.

Babu Shīb Chandra Palit, for the respondents.

BRETT AND SHARFUDDIN JJ. This is an appeal against an order of the lower Court setting aside a sale held for arrears of Government revenue. It appears from the judgment of the lower Court that a *talug* called Pachitira, bearing No. 160 on the Collectorate roll of Balasore, was sold for arrears of Government revenue for the November kist of 1904, amounting to Rs. 24. The property was sold on the 6th February 1905 for Rs. 1,000 and purchased by the appellants, and the sale was confirmed on the 1st August of the same year. There was an appeal to the Commissioner by the respondents, the original proprietors, which was rejected on the 3rd July 1905. The present suit was instituted on the 3rd July 1906 under section 33 of Act XI of 1859.

The grounds which were put forward for setting aside the sale were two : *First*, that in the 6th column of the sale proclamation, under section 6 of Act XI of 1859, the name of the

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proprietor was wrongly stated. The name given was Bhajan Raut of Jesatikri. It seems that there is on the Collectorate roll of the Cuttack District a mehal bearing Towzi number 160, and that the proprietor of that mehal is Bhajan Raut. Rent for this mehal is paid into the Balasore Collectorate. The case for the plaintiffs was that, owing to that mis-statement in the sale notification, intending bidders were misled; that there was doubt as to the estate which was actually being sold, and that, in consequence, the mehal, the proper value of which was Rs. 6,000, was sold for Rs. 1,000 only.

The second point taken was that the notice required by section 7 of Act XI of 1859 was served, not in mehal Pachitira, which is estate No. 160 on the Balasore Collectorate, but in mehal Bhagra, which is estate No. 160 on the Collectorate roll of the Cuttack District, and of which the proprietor is Bhajan Raut. It was contended that this constituted a serious irregularity, and that, these two irregularities having resulted in a substantial loss to the proprietor of the mehal, the sale should be set aside. The lower Court has come to the conclusion that these mistakes in the proceedings leading up to the sale constituted irregularities. It has also come to the conclusion that the property was sold for a very inadequate price, that the proprietors suffered substantial loss, and that the loss was consequent on the irregularities.

It has been contended before us that, under the rulings of this Court, the view taken by the lower Court cannot be supported. It has been argued, on the authority of the case of *Deonandan Singh v. Manbodh Singh* (1), that it must be held that the mis-statement of the name of the proprietor in the sale notification did not constitute an irregularity, because the provisions of section 6 of Act XI of 1859 do not require that the name of the proprietor should be entered in the sale notification. It has also been contended that the service of the notice under section 7 of Act XI of 1859 in the wrong village cannot be regarded as an irregularity, which, coupled with substantial loss, would have the effect of vitiating the sale, because, under

(1) (1904) I. L. R. 32 Cal 111.

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the provisions of section 8 of Act VII (B.C.) of 1868, the sale certificate itself must be taken to be conclusive evidence in favour of the purchaser that the notices had been duly served and posted. In our opinion, the facts of the present case are peculiar, and the ruling on which the learned pleader for the appellants has relied cannot be taken to afford sufficient authority for holding that the view taken by the lower Court is incorrect. In the present case, we have it as a fact that there are two estates bearing the same number—one on the Cuttack Collectorate roll, and the other on the Balasore Collectorate roll; that the estate which was sold, belonging to Ganesh Prasad and others, was numbered 160 of the Balasore Collectorate, and the estate bearing number 160 on the Collectorate roll of Cuttack is the property of Bhajan Raut. The description given in the 6th column of the sale notification was certainly one which was calculated to create confusion, and in itself would appear to indicate that the Collectorate authorities were of opinion that the estate which was about to be sold was estate No. 160 on the Cuttack Collectorate. Evidence has been given to prove that in this case persons came to the sale intending to buy the estate on the Cuttack Collectorate, which they thought was about to be sold, but that, when they arrived, they found that there was some confusion, as the *talug* was described as Pachitira and not Bhagra, and, therefore, they went away without making any bids. One of the witnesses says that if the name of the owner of Pachitira had been entered in the sale notification he might have bid at the sale. The lower Court has come to the conclusion that the mis-statement in the sale notification had the effect of misleading intending bidders, and that therefore it was an irregularity. The case on which the learned pleader for the appellants has relied in support of the present appeal does not go so far as to say that, where there has been a mis-statement which has misled intending bidders, it would not constitute an irregularity, but what was decided in that case was that the statement of the name of a deceased proprietor was not an illegality which would render the sale void, because, under the terms of the Act,

it was not necessary to enter the name of the proprietor at all. The mere fact that the law does not require the name of the proprietor to be entered is very different from what has been alleged to have occurred in the present case, namely, that the name of a wrong proprietor was entered, and that, in consequence of that mis-statement, intending bidders were misled. In our opinion such an incorrect entry resulting in misleading intending bidders must be held to be an irregularity such as is contemplated by section 33 of Act XI of 1859. It has been suggested that this irregularity is not contrary to the provisions of the Act. In our opinion it is such a departure from the provisions of the Act as to constitute an act contrary to the provisions of the law. The object of the provisions of the Act is to give to the intending purchasers correct information as to the property to be sold, and when, as in this case, wrong information has been given, and intending bidders have been misled or involved in doubt as to the property to be sold, that is an act contrary to the intention of the Act. We are, therefore, of opinion that in the present case the lower Court was perfectly right in holding that the mis-statement contained in the sale notification constituted a substantial irregularity.

So far as the second point is concerned, we are of opinion that though the provisions of section 8 of Act VII (B. C.) of 1868 would prevent the plaintiffs from proving that there was any irregularity in the service or posting of the notice required by the provisions of section 11 of the Act, still it would not prevent them from proving, as in the present case, that a notice in contravention of the provision of that Act had been served in a wrong mehal, which in itself and by its service supported the conclusion that the mis-statement in the sale notification constituted a serious irregularity, because it led to mistakes in the service of the notice with the result of deterring intending purchasers from bidding at the sale.

We think, therefore, that the judgment and decree of the lower Court are not open to objection. We accordingly confirm them and dismiss the appeal with costs.

R. G. M.

Appeal dismissed.

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CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

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March 7.

EMPEROR

v.

SOURINDRA MOHAN CHUCKERBUTTY.*

Bail—High Court, jurisdiction of, to grant bail—Grounds of bail—Sufficient cause for further inquiry into guilt of accused—Undue delay—Taking cognizance—Application of special procedure to the case—Power of the Lieutenant-Governor—Criminal Procedure Code (Act V of 1898) ss. 190, 497, 498—Criminal Law Amendment Act (XIV of 1908) ss. 2, 12 & 14 (1).

The power of the High Court to grant bail "*in any case*" under s. 498 of the Criminal Procedure Code is not affected by Act XIV of 1908, but the Court ought, in the exercise of its discretion, to take into consideration the limitation imposed by s. 12 of the latter.

The High Court refused bail where it appeared from the record and the Magistrate's explanation that there was cause for further inquiry into the case against the petitioner, and that there had been till then no undue delay in the proceedings.

Where a police report of a dacoity was submitted to the Sub-Divisional Officer of Diamond Harbour on the 24th April 1909, the date of the dacoity, and the case was subsequently withdrawn by the District Magistrate to his own file, and on the 20th January 1910 an order was made by the Lieutenant-Governor in terms of s. 2 of Act XIV of 1908, applying the provisions of Part I to the case:—

Held, that the latter Magistrate had taken cognizance, and that the Lieutenant-Governor had power to make the order.

The petitioner is the son of Babu Mohini Mohan Chuckerbutty, a vakil of the High Court, residing at 31, Sitaram Ghose's Street in the town of Calcutta. The facts of the case appear to be that on the 24th April 1909 a dacoity took place at Nettra, and on the same day the police sent up a report of the occurrence to the Sub-divisional Officer of Diamond Harbour. On the 2nd September Lalit Mohan Chuckerbutty, one of the accused concerned, was arrested, and made a confession on the 18th October. The case was subsequently transferred by the District Magistrate of Alipore to his own file, and, on the 20th

*Criminal Miscellaneous No. 29 of 1910, against the order of F. R. Roe, Sessions Judge of Alipore, dated Feb. 17, 1910.

January 1910, an order under section 2 of Act XIV of 1908 was issued in the following terms :—

“Whereas the District Magistrate of the 24-Parganas has taken cognizance of offences under ss. 395 and 397, I. P. C., alleged to have been committed by the persons accused in the case of *Emperor v. Lalit Mohan Chuckerbutty* and others, known as the Nettra dacoity case, . . . and whereas it appears to the Lieutenant-Governor of Bengal that . . . the provisions of Part I of the Indian Criminal Law Amendment Act should be made to apply to the proceedings in respect of the said offences, now, therefore, the Lieutenant-Governor, with the sanction of the Governor-General in Council, hereby directs . . . that the provisions of the said Part shall apply to the said case.

By order of the Lieutenant-Governor of Bengal,

(Sd.) F. W. DUKE,

20th Jan. 1910.

Chief Secretary to the Government of Bengal.”

On the same day the house of the petitioner's father was searched, but nothing incriminating found. By arrangement with the Commissioner of Police the petitioner surrendered on the 24th, and was arrested by the police and put up before the Joint Magistrate of Alipore, who remanded him to jail. An application for bail was then made on the 28th to the District Magistrate, who passed an order as follows :—“I know nothing about the accused. Let the record be put up to-morrow at my room.” On the next day he refused bail stating “He was only arrested on the 24th January, and I, therefore, refuse bail.” Another application made to him on the 5th February was also rejected on the ground that it was a case under special procedure, and that it was perfectly useless to ask for bail. The Sessions Judge was next unsuccessfully moved for bail under section 498 of the Criminal Procedure Code on the 17th. The petitioner then obtained a Rule from the High Court on the 23rd, calling upon the District Magistrate to show cause why bail should not be granted on the grounds that no order had been made applying Act XIV of 1908, and that there did not appear any sufficient cause for further inquiry into the guilt of the petitioner.

The Magistrate submitted the following explanation :—

“This accused has so far been in custody for one month. The police inquiry is not being conducted under my orders, but the record shows that the accused has made a full confession. It is also within my knowledge that other evidence of a similar nature is in the possession of the police. There are 17 accused

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under arrest, and I do not think the time has yet come when I would insist on the police placing before me the evidence which implicates each of them. I further beg to inform you that Sourindra Mohan Chuckerbutty is in custody on a warrant issued under s. 400, I. P. C., by the District Magistrate of Howrah.'

It appeared that when the Rule came on for hearing the final police report in the case had not been submitted, nor had any magisterial inquiry under Act XIV of 1908 commenced, nor was any evidence recorded against the petitioner.

The Advocate-General (The Hon'ble Mr. Kenrick, K.C.) and The Deputy Legal Remembrancer (Mr. Orr), for the Crown. A police report of the dacoity was sent in on the 24th April 1909, and the case was pending before the District Magistrate on the 20th January 1910, when the order of the Local Government under section 2 of Act XIV of 1908 was passed. It cannot be said that the Magistrate has not taken cognizance when the above order has been made and the accused are in custody under his directions. As to the jurisdiction of the High Court, section 12 of the new Act must be read with section 14 (1), and it is clear that these sections are the antithesis of sections 497 and 498 of the Code. The High Court has no power under section 498 to grant bail in cases to which the Act has been applied, as in exercising it the Court would be giving effect to a section of the Code inconsistent with the scope of the Act. The object of the recent Act is to secure a speedy trial, and the release of an accused on bail was not intended. Section 498 has, by implication, been repealed by the Act. The accused was arrested only on the 24th January, and the police investigation is still pending. It cannot now be determined that there is no ground for further inquiry into his guilt.

Babu Sarat Chandra Roy Chowdhry (with him Babu Dasha-rathi Sanyal), for the petitioners. Act XIV of 1908 does not apply to the case of the present accused. There is nothing to show that the petitioner was arrested as an accused in the case to which the Government order of the 20th January refers. The Act can only be applied after a Magistrate has already taken cognizance. There is nothing to indicate that cognizance has been taken of any case against the present accused. The

Magistrate's explanation shows that cognizance has not yet been taken. The final police report has not yet been sent in, and there is no suggestion that cognizance could be taken in any other way under section 190 of the Code: *Lee v. Adhikary* (1). Further, the Magistrate cannot be said to have taken cognizance, as under section 3 of Act XIV of 1908 the inquiry next follows, and no police investigation, as is now pending, can intervene between the taking of cognizance and the inquiry. As to the jurisdiction of the High Court under section 498 of the Code, the new Act does not affect it. Section 12 thereof only curtails the power of the Magistrates under section 497 of the Code, and the provisions of section 498 of the latter are not inconsistent with any procedure prescribed by the Act. The power of the High Court under section 498 cannot be taken away by implication: see Maxwell on Interpretation of Statutes, 4th edition, pp. 122, 193 and 233. This is a fit case for bail. The accused has been in custody for over a month without evidence against him being recorded. The police have had ample time since his arrest to procure evidence, but it does not appear that they have any incriminating evidence against him: *Jamini Mullick v. Emperor* (2).

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STEPHEN AND CARNDUFF JJ. A rule has been granted in this case on the District Magistrate of the 24-Parganas to show cause why bail should not be granted on the ground that no order has been made applying the Indian Criminal Law Amendment Act, 1908, to the case; and on the further ground that there does not appear to be any sufficient cause for further inquiry into the guilt of the accused.

The facts relating to this matter are as follows. A dacoity, commonly referred to as the Nettra dacoity, took place on the 24th April 1909. On the 20th January 1910, the Local Government made an order under section 2 of the Criminal Law Amendment Act, 1908, purporting to apply the provisions of Part I of that Act to the offence. On the 24th January 1910 the petitioner was arrested on suspicion of being concerned in it,

(1) (1909) I. L. R. 37 Calc. 49.

(2) (1908) I. L. R. 36 Calc. 174.

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and so having committed offences under sections 395 (dacoity) and 397 (dacoity with attempt to cause death or grievous hurt) of the Indian Penal Code. On the 28th January he applied to the District Magistrate to be released on bail, which was refused, and a similar application was afterwards made on the 5th February and likewise refused. On the 17th February he made a third application to the Sessions Judge, and this also was refused. On this rule two points have been taken : the first is that the Local Government had no power to make the order of the 20th January ; and the second, that we ought to admit the petitioner to bail on the merits of the case.

The first point rests on the assertion that a Magistrate had not taken cognizance of the Nettra dacoity on the 20th January. The appellant's advocate has laboured under the disadvantage of not having seen the record in the case, as the magisterial inquiry was, according to section 4 of the Act, *ex parte*, and we have not thought it right to allow him access to it. He had, therefore, a right to make any suppositions as to the facts appearing on the record, asking us to verify them afterwards. On looking at the record, we find that a police report was made to the Sub-divisional officer of Diamond Harbour on the 24th April, the day when the dacoity is alleged to have taken place, and that the case was afterwards transferred to head-quarters. Cognizance had, therefore, been taken of the offence on the 20th January 1910, as recited in the order of the Local Government of that date ; for taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.

On the second point, as to whether we should grant bail in this case, we must first consider the point whether we have jurisdiction to do so. As to this the law seems to us quite clear. As the High Court, which we are for present purposes, our power to grant bail "in any case," as given by section 498 of the Criminal Procedure Code, is quite unfettered, though we consider that in exercising our discretion we ought to take into consideration the limitations on the power of other authorities

to grant bail imposed by section 497. The question then arises whether any restriction has been placed on our power by the Criminal Law Amendment Act, 1908, and we are of opinion that it has not. By section 12 of that Act the powers of releasing on bail, given by section 497 of the Criminal Procedure Code, have been made subject to the provision that no person remanded to custody in the course of proceedings under the Act shall be released on bail if there appear to be sufficient grounds for inquiry into his guilt. The former section does not in terms apply to section 498 of the Code, but we are of opinion that we ought to take its provisions into consideration in the same way as we think we ought to take into consideration those of section 497. We have then to consider whether there is anything in section 498 of the Code, as to the granting of bail by the High Court, which is inconsistent with the special procedure prescribed by Part I of the Act of 1908, and is, therefore, abrogated by force of section 14 (1) of that Act. We must hold that there is not. In the first place section 498 of the Code is not referred to in section 12 of the Act, and, *prima facie*, the provisions of the former are left intact. Secondly, as a prominent feature of the special procedure before a Magistrate under the Act is the absence of the accused during the magisterial enquiry, it is difficult to see how the grant of bail by proper authority can be called in question. And, thirdly, as the scheme of the Act is commitment by the Magistrate direct to the High Court, there is nothing in the intervention of the High Court which is inconsistent with that special procedure. We hold, then, that it is open to us to exercise the power of the High Court under section 498 of the Code.

We then come to the real question before us, which is whether we ought to admit the petitioner to bail in this case. On reading the record and the Magistrate's explanation, we are of opinion that there is cause for further inquiry into the case against the petitioner, and that there has not so far been undue delay in the proceedings. The rule is, therefore, discharged.

E. H. M.

Rule discharged.

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PRIVY COUNCIL.

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v.

REGISTRAR, SMALL CAUSE COURT, AMRITSAR.

P.C.*
1910

March 9.

[On appeal from the Chief Court of the Punjab, at Lahore.]

Insolvency—Punjab Laws Act (IV of 1872) s. 27—Order of Insolvent Estates Court at Amritsar declaring debtors insolvents and appointing a Receiver—Subsequent order of High Court, Bombay, under 11 and 12 Vict. (Indian Insolvent Act) declaring some debtors insolvent and vesting their property in Official Assignee, Bombay.

By the provisions of the Punjab Laws Act (IV of 1872) as to the property in the Punjab of debtors who have, by an order under the Act, been declared insolvents, the Court is entrusted (by section 27) with merely administrative powers with regard to it, and no transfer of the property takes place:

Held, therefore, by the Judicial Committee (reversing the decision of the Chief Court), that where such an order had been made by the Insolvent Estates Court at Amritsar in respect of certain debtors carrying on business at (amongst other places) Amritsar and Bombay, and a Receiver of their property had been appointed by the Court, a subsequent order of the High Court of Bombay in its Insolvency Jurisdiction, made under the Indian Insolvent Act (11 and 12 Vict., C. 21), declaring the same debtors insolvents and vesting their property in the Official Assignee of Bombay, had the effect, notwithstanding that it was of later date than the order of the Punjab Court, of vesting all the property of the debtors, including that in the Punjab, in the Official Assignee of Bombay.

The High Court had rightly held that the Insolvent-debtor sections of the Civil Procedure Code (Act XIV of 1882) were not applicable to the case.

APPEAL from a judgment and decree (5th May 1908) of the Chief Court of the Punjab, which affirmed a decision (17th June 1907) of the Insolvent Estates Court, Amritsar.

The petitioner in the Amritsar Court was the appellant to His Majesty in Council.

The proceedings out of which this appeal arose were commenced by a petition to the Insolvent Estates Court at Amritsar by the appellant, the Official Assignee of Bombay (who in that

* *Present*: LORD MACNAGHTEN, LORD COLLINS, LORD SHAW and SIR ARTHUR WILSON.

capacity was assignee under the Insolvent Debtors' Act 11 and 12 Vict., C. 21, and a vesting order, dated 31st May 1907, made by the High Court at Bombay in its Insolvency Jurisdiction, of the estate and effects of Ganesh Das and others) for an order that the respondents should deliver to him certain property in the jurisdiction of the Amritsar Court as forming part of such estate and effects.

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It appeared that the insolvents had carried on business together at Amritsar, Benares, and Bombay up to the end of November 1906. On 3rd December 1906 certain of their creditors applied under the Punjab Laws Act (IV of 1872) to the Insolvent Estates Court, Amritsar, for an order, which was granted by the Court, calling on the debtors to show cause, on 12th December, why they should not be declared insolvent: and on that day four of the debtors appeared and were, with their own consent, declared insolvent, and the Registrar of the Small Cause Court, Amritsar, (now the first respondent), was appointed Receiver of their estate and effects.

On 31st May 1907 the abovementioned orders were made by the High Court at Bombay adjudicating the debtors insolvent under 11 and 12 Vict., C. 21, and vesting their estate and effects in the appellant as Official Assignee, Bombay, and intimation of those orders was sent to the Judge of the Small Cause Court, Amritsar.

On 10th June 1907 the first respondent being about to proceed on leave, the second respondent was appointed Receiver in his place, and he proceeded to take steps for the realization of certain property belonging to the debtors. The present appellant thereupon applied to the High Court at Bombay in its Insolvency Jurisdiction for, and on 13th June 1907 obtained, an order that the first respondent should hold and retain the property in question, and show cause why it should not be delivered over to the appellant for the benefit of the general body of creditors of the insolvent debtors. Further proceedings in Bombay will be found reported in I. L. R. 32 Bom. 198.

On 15th June 1907 the appellant preferred the petition above mentioned, and another one, to the Insolvent Estates

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Court, Amritsar, praying in the latter that the intended realization of property should not take place, and in the former that all the property of the debtors should be handed over to him. These petitions were disposed of by the Judge of the Insolvent Estates Court, Amritsar, on 17th June 1907, and were rejected on the ground that, "from the date of the appointment (12th December 1906) all the insolvents' property in the Punjab vested in the Receiver under section 354 of the Civil Procedure Code, and that there were, therefore, no rights in the property subsisting in the insolvents on 31st May 1907, when the Bombay High Court passed the vesting order."

On an application by the Official Assignee, Bombay, to the Chief Court for revision of that decision, Sir W. Clark, Chief Judge, and Mr. W. Chevis, Judge, came to the same conclusion as the Amritsar Court, but for different reasons. The material portion of their judgment was as follows :—

"The Judge has held that the Receiver was appointed under section 351, Civil Procedure Code, and that, under section 354, Civil Procedure Code, all the insolvents' property vested in the Receiver on the day he was appointed.

"We are unable to accept this view.

"The Judge of the Small Cause Court has jurisdiction in insolvency matters, both under Act IV of 1872 and as District Judge under the Civil Procedure Code, but the two jurisdictions cannot be mixed up.

"The present proceedings were conducted under Act IV of 1872, and could not have been taken under the Civil Procedure Code, as the conditions necessary for institution of insolvency proceedings under the Code did not exist. All the proceedings in this case, therefore, must be held to be under Act IV of 1872, and sections 351 and 354 of the Civil Procedure Code cannot be applied.

"Though we are unable to maintain the Judge's decision on the grounds on which he based his decision, we think it is right on other grounds.

"In our opinion it is an essential element of a declaration of insolvency that the insolvent's property should cease to be the property of the insolvent and become the property of the Court, or of some one appointed by the Court, for the benefit of the creditors. We find that is what happens under the Insolvent Debtors in India Act (1848), 11 and 12 Vict., C. 21, section 7. The same happens under the English Law of Bankruptcy, 1883 : see Baldwin's Law of Bankruptcy, 9th edition, page 204. 'The Court is to adjudge the debtor bankrupt; and thereupon the property of the bankrupt will become divisible among his creditors and vest in a trustee.' The Civil Procedure Code, sections 351 and 354, lays down the same law, and so does the New Provincial Insolvency Act (III of 1907) sections 16 and 23.

"It is true that Act IV of 1872 does not in so many words say that the property of the insolvent vests in the Court, but on a careful consideration we

think that that is what is provided by the Act. Section 24 lays down what constitutes an insolvent, and then section 27 lays down—The property of the insolvent shall be sold or administered, under the direction of the Court, either through the agency of its own officers or of assignees to be appointed by the Court in the manner most conducive to the interests of the creditors, and the proceeds shall be divided rateably amongst them.’

“We think that the substantial meaning of this section is that the property was to be treated as if it had vested in the Court for the benefit of the creditors, and provided for its being sold, or otherwise administered, by the Court.

“Objection has been taken to the order of the 12th December 1906, making the declaration of insolvency, and undoubtedly the order is defective, in that it did not pass an order exempting the person and property of the debtor from further legal process, s. 24 (5), which order attaches to itself the consequence of being deemed an insolvent. The order, however, was passed with the consent of the debtors; and complied with the provisions of section 24 as regards furnishing of security, and requiring the debtors to make a statement of their assets and liabilities, and it wound up by appointing the Registrar of the local Small Cause Court, Receiver.

“We have no hesitation in holding that this order, though irregular and incomplete, did in fact make the debtors insolvents from the date it was passed, and that the consequences of being insolvent attached to that order, one of which was that the property of the debtors vested in the Court.

“We have referred to the rules made under section 31 of the Act, but they do not help us in interpreting the wording of the Act on the point before us. Punjab Record No. 46 of 1874 has also been referred to, but it only lays down with reference to the necessity of the Official Assignee being impleaded in a suit against the insolvent that the law casts no representative character upon him, and the Act and rules throw the duty on the Court of taking charge of the Estate. The decision does not help in any way towards the elucidation of the point before us.

“The rulings quoted to show that prior attachment confers no title [*Peacock v. Madan Gopal* (1), and *Kristnasawmy Mudaliar v. Official Assignee of Madras* (2)], have no relevancy in our view of the case that the property of the insolvents was vested in the Court, and there was no property of the insolvents left on which the order of the Bombay High Court could operate.

“The insolvents’ place of business was Amritsar. The great bulk of their creditors live there or in other parts of the Punjab; they were by consent declared insolvents in the Amritsar Court on 12th December 1906, and then they, or a few of their creditors, endeavour, by an order of 21st May 1907 of the Bombay High Court, to have the insolvency conducted in the Bombay High Court. The case seems somewhat similar to that of *In re Aranvayal Sabhapathy Moodliar* (3).

“We think that the Judge rightly dismissed the application of the Official Assignee, Bombay, and we dismiss the revision with costs.”

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(1) (1902) I. L. R. 29 Calc. 428.

(2) (1903) I. L. R. 26 Mad. 673.

(3) (1897) I. L. R. 21 Bom. 297.

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On this appeal, which was heard *ex parte*,

W. O. Danckwerts, K.C., and *Kenworthy Brown*, for the appellant, contended that the order of 12th December 1906 and the subsequent proceedings did not operate to divest the debtors of their property in the Punjab, nor to vest the property either in the Receiver thereby appointed, or in the Court; that all the property of the debtors, including the property in the Punjab, became vested in the appellant as Official Assignee under the order of the High Court at Bombay in its Insolvency Jurisdiction on 31st May 1907, the jurisdiction of the latter Court overriding that of the Insolvent Estates Court, Amritsar. Reference was made to the Indian Insolvent Act (11 and 12 Vict., C. 21), sections 2, 7, 8, 9, 13, 21, 26; The Punjab Laws Act (IV of 1872), sections 22, 24-27, 30, 31; Punjab Record for 1874, case No. 46, page 176; Rules under the Punjab Laws Act, Nos. 2, 4-7, 9-11, 14, 15, 17, 26 and 38; and the Insolvency Act (III of 1907), section 1, sub-section 3, and sections 16 and 23. The Civil Procedure Code (XIV of 1882), it was submitted, was not applicable, sections 351 and 354 being referred to. As to the effect of attachment as only preventing alienation and not giving title, reference was made to *Moti Lal v. Karrabuldin* (1). In any event, if only as a matter of convenience, the appellant's application should have been granted, and the debtors' property in the Punjab made over to him to be dealt with.

March 9.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal against a judgment of the Chief Court of the Punjab, which affirmed that of the Insolvent Estates Court, Amritsar. The controversy involved in the appeal relates to an alleged conflict of jurisdiction between two Courts, both having Insolvency Jurisdiction, but jurisdiction created by different legislative authority and different in its local extent.

Under the Imperial Act of Parliament, 11 and 12 Vict., C.

(1) (1897) I. L. R., 25 Calc. 179; I. R. 24 I. A. 170

21, relating to insolvency proceedings before what are now the High Courts in the Presidency towns in India, jurisdiction is conferred upon those Courts extending, for the present purpose, over the whole of India, and for many purposes over much wider limits.

Under the Punjab Laws (Act IV of 1872), in a series of sections beginning with section 22, the Governor-General in Council has created a system of insolvency of its own, but of course such an Act can be effective only within the ambit prescribed by the Act. These are the two systems of Insolvent administration which have to be considered in disposing of the present appeal, and have, if possible, to be reconciled.

There is, indeed, a third system in India, embodied in Chapter XX of the Civil Procedure Code. This last-mentioned system need not be further alluded to, for their Lordships are of opinion that the learned Judges of the Chief Court were right in considering that it had no application to the circumstances of the present case.

The facts of the present case are simple. The debtors were a firm of traders who carried on business at Amritsar and other places in the Punjab, and also at Bombay and elsewhere. On the 3rd December 1906, the Amritsar Insolvency Court, on the application of a creditor, ordered a notice to issue calling upon the debtors to show cause why they should not be declared insolvent and attaching their property in the Punjab. On the 12th December, in the presence of four out of the five members of the debtor firm, another order was made declaring them insolvent, and requiring them to furnish security and to put in lists of property, creditors and debtors.

On the 31st May 1907, certain other creditors applied to the High Court at Bombay, in its Insolvency jurisdiction, against all the members of the debtor firm, praying that they might be adjudicated insolvent under 11 and 12 Viet., C. 21. An order was made accordingly, and at the same time a vesting order, vesting the property of the debtors in the Official Assignee of Bombay.

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The Official Assignee, who is the appellant here, applied to the Insolvent Court at Amritsar to abstain from realizing the property of the debtors, and asked that that property should be made over to him. The Amritsar Court refused the application, holding that the property of the debtors in the Punjab had vested in a Receiver appointed by the Court, and that, therefore, there was no property of the debtors in the Punjab upon which the subsequent vesting order made by the Bombay Court could take effect.

Against this refusal there was an appeal to the Chief Court, and that Court held that the Amritsar Court was wrong in saying that the property in the Punjab was vested in the Receiver, but held further that the order appealed against was right, on the ground that the property in question was by law vested in the Court, and, therefore, could not pass under the subsequent vesting order of the Bombay Court.

The facts which have been stated are those which appear to their Lordships material for the present appeal, which is brought against the order of the Chief Court.

It is clear that under the insolvency system established by the Imperial Act, the High Court of Bombay, if unimpeded by any other Court, can effectually administer the estate of an Insolvent in such a case as the present.

The question raised upon this appeal is, whether proceedings under the Punjab Laws Act control the powers of the Bombay Court.

It would be matter for regret if the powers of one Court to administer an estate completely were restrained by those of another Court which can only do so locally and partially. But it appears to their Lordships that no such inconvenience necessarily arises.

Under the Imperial Act, 11 and 12 Vict., C. 21, when an adjudication is made by the Court which is now the High Court of Bombay, the estate of the debtor vests in the Official Assignee, and he is to administer it. What has been held by the Chief Court is that in the present case that law did not apply to property in the Punjab which had belonged to the

debtors concerned, because that property had, before the date of the vesting order of the Bombay Court, been transferred under the Punjab Laws Act, already referred to, to the Punjab Court. The question therefore is, whether the Chief Court was right in holding that the property in the Punjab had vested in that Court, so as to exclude the operation of the Bombay vesting order.

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Their Lordships are unable to agree with the learned Judges of the Chief Court.

The section of the Punjab Laws Act on which the power of the Punjab Court depends for the present purposes is as follows :—

Section 27 says :

“The property of the Insolvent shall be sold or administered under the direction of the Court, either through the agency of its own officers or of assignees to be appointed by the Court, in the manner most conducive to the interest of the creditors, and the proceeds shall be divided rateably amongst them.”

It appears to their Lordships to be clear that under the Punjab Laws Act, what is entrusted to the Punjab Court is merely administration, and that under that Act no transfer of property takes place.

Their Lordships regret that they have to deal with this question in an appeal heard *ex parte*. The difficulty thus arising is diminished, however, by the fact that the question is purely one of law.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, and the judgments of the Chief Court of the Punjab and of the Insolvent Estates Court, Amritsar, set aside with costs in both Courts, and in lieu thereof it should be declared that the property of the insolvents in the Punjab is vested in the Official Assignee, Bombay.

The costs of this appeal are to be taxed as between solicitor and client and paid out of the insolvents' estate.

Appeal allowed.

Solicitors for the appellant: *Monnier-Williams, Robinson & Milroy.*

PRIVY COUNCIL.

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[On appeal from the Chief Court of the Punjab, at Lahore.]

Appeal—Appeal from order dismissing suit under s. 102, Civil Procedure Code (Act XIV of 1882)—Suit in which two distinct claims were made—Claim to recover money paid to release attachment disallowed—Claim for damages for wrongful attachment withdrawn—Non-appearance of plaintiff—Improper procedure in dismissing suit for default—Remand.

The plaintiff (appellant) made two claims, one for money paid into Court to release from attachment property which he alleged he had purchased, but which had been attached as belonging to the Delhi Cotton Mills Company against which the defendant (respondent) held a decree; and the other for damages for the wrongful attachment. As to the former claim, the District Judge ruled "that the payment was entirely voluntary and for plaintiff's own interests, and that his remedy is under sections 69 and 70 of the Contract Act against the Delhi Cotton Mills, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment." Evidence was proceeded with on the claim for damages, and after unsuccessfully petitioning that a decree might be drawn up in respect of the dismissal of his claim to the money paid into Court, and for leave to withdraw his claim for damages under section 373 of the Civil Procedure Code (Act XIV of 1882), with liberty to bring a fresh suit, the plaintiff unconditionally withdrew from the claim for damages, but not from the claim to the recovery of the money paid. Subsequently, the defendant proceeded to give evidence upon the issues raised in the case, and eventually, the plaintiff not appearing, the District Judge dismissed the whole case for default under section 102 of the Code. On appeal to the Chief Court, the majority of a Full Bench of that Court decided that no appeal lay from an order dismissing a suit under section 102, and the appeal was consequently dismissed:

Held, by the Judicial Committee, that after the decision of the District Judge adverse to the plaintiff on the claim to recover the money paid, which left no question as to that claim open in the Court of first instance, and the abandonment by the plaintiff of the claim to damages, there remained nothing in substance to be tried; and that the case was one not proper to be dealt with under section 102. Without deciding (as being, therefore, unnecessary) the question whether an appeal would lie against a dismissal regularly made under that section, their Lordships remanded the case to the Chief Court to decide the appeal on its merits.

* *Present*: LORD MACNAGHTEN, LORD COLLINS and SIR ARTHUR WILSON.

APPEAL from a judgment and decree (16th March 1907) of the Chief Court of the Punjab, which affirmed an order and decree (26th May 1903) of the District Judge of Delhi.

The plaintiff was appellant to His Majesty in Council.

The facts out of which this appeal arose were that on 21st April 1902, in a suit of the National Bank of India *v.* The Delhi Cotton Mills Company, the Chief Court of the Punjab on appeal made a money decree in favour of the Bank for Rs. 97,506-12-2 with interest thereon at the rate of 6 per cent. per annum from the date of suit till payment. On 25th June 1902 the premises and Mills of the Delhi Cotton Mills Company were purchased as a going concern by the present appellant at public auction for Rs. 5,02,000. On 15th August 1902 the Bank, in execution of their decree, applied to the Court of the District Judge, Delhi, for and obtained a warrant of attachment of the premises of the Cotton Mills Company (purchased as above mentioned by the appellant) and in compliance with the warrant, the bailiff accompanied by the Manager of the Bank, notwithstanding the objections and protests of the appellant's servants, entered upon and took possession of the said premises and mills on or about the 20th August 1902.

On 27th August 1902 the appellant filed a petition in the District Court, Delhi, setting out that he was the owner of the premises and mills attached, that that attachment was wrongful, that by such attachment he had been prevented from making the necessary arrangements for working the mills, and that such attachment "has caused him, and is likely to cause him, considerable loss which he will be quite unable to prove to its full extent, and is compelled to pay the balance of the decree of the Bank against the Delhi Cotton Mills Company, and he hereby produces the money for such purpose under protest." The appellant thereupon paid the money, Rs. 83,005, into Court, obtaining at the same time an order from the District Judge releasing the property from attachment.

On the next day, the 28th August 1902, the appellant instituted the suit out of which the present appeal arose against the Bank. In the plaint, after setting out the facts, the plaintiff

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prayed for a decree (a) for the return of the sum of Rs. 83,005 he had paid into Court, together with Rs. 27-8-3 interest for one day at 12 per cent., in all Rs. 83,032-8-3 with interest thereon at the same rate till realization from the Bank, and (b) for Rs. 10,000 damages for trespass and wrongful attachment.

The defendant Bank filed preliminary and further pleas to the effect that the suit as framed would not lie ; that the plaint disclosed no cause of action against the Bank ; that the plaint disclosed no coercion in respect of the payment of the amount alleged ; and that, if the suit could proceed, the Cotton Mills Company ought to be joined as a party. The Bank denied that the plaintiff was the proprietor of the premises attached, or that he was so to the Bank's knowledge ; they denied that the attachment was wrongful, and also that at the time of the attachment the Bank knew that the Cotton Mills Company had no right to the premises, the fact being that the Bank believed that the Company had a good title thereto. The Bank further denied that the plaintiff had suffered any damage in consequence of the action of the Bank, or that, if he had, the Bank was liable therefor, or that he had been compelled to pay any sum due to the Bank, the fact being that if he did make such payment he did so on behalf of the Cotton Mills Company and for his own convenience and advantage ; and, finally, it was denied that the plaintiff was entitled to the remedies he claimed.

Thereupon the following preliminary issues were framed :

1. Will the suit as framed not lie ?
2. Is there no such privity between the plaintiff and the defendant as to give the former a cause of action against the defendant ?
3. Does the payment, accepting the statement that, as a matter of fact, the payment was made by the plaintiff to protect his own property, amount at law, since the payment was in an execution of a decree, to a payment on behalf of the judgment-debtor, and if so, has the plaintiff no remedy against the defendant ?
4. Do the circumstances of the payment, accepting the plaintiff's statement as true, not entitle the plaintiff to recover ?
5. Is there misjoinder of causes of action in the claim to recover money and damages ?

After hearing argument on these issues and considering the law on the subject, the District Judge, on the 18th November

1902, held, as to the plaintiff's right to recover the money paid to satisfy the Bank's decree,

"That the payment was entirely voluntary and for the plaintiff's own interests, and that his remedy is under ss. 69 and 70 of the Contract Act against the Delhi Cotton Mills Company, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment."

On the claim for damages the plaintiff traversed and joined issue on the defendant Bank's further pleas, and on 28th November 1902 the District Judge decided that there was no necessity to add the Cotton Mills Company as a party to the suit, and that the main question being as to the plaintiff's title, he should make a full disclosure thereof with liberty to the Bank to interrogate.

On 3rd December the plaintiff applied by petition that a decree should be drawn up as to the Court's judgment of the 18th November 1902, dismissing the plaintiff's claim to a refund of the money paid to the defendant Bank. On 20th December the District Judge dismissed the petition on the ground that that course was unnecessary, "as the final order in the case is the one on which the decree will be based, and the meaning of the order passed is that the claim for recovery is disallowed with costs rather than that the case is dismissed."

The plaintiff afterwards applied for a review of the order of 18th November 1902, on the ground that the District Judge's view as to the plaintiff's right to recover the money was erroneous. The application was heard on 21st March 1903, and was dismissed as being more a matter for appeal when a final decree was made on the whole case, than for review of the order of 18th November 1902. The District Judge said :—

"What that order was meant to lay down was that the Court on the allegations contained in the plaint, which at the time, for the sake of argument, it assumed to be correct, held that there had been an illegal attachment for which a suit for damages might be brought, but that the defendants were not detainers in the sense of detention as defined in s. 15 of the Contract Act. That is to say, that the assumed illegal attachment was not coercion in the sense of that section. . . . But the order was far from laying down that the plaintiff could not sue for damages for illegal attachment."

On the same day issues were framed by the Judge as to the plaintiff's right to recover damages, which came on for hearing

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on 16th and 17th April, when oral and documentary evidence was given on behalf of both parties.

On 25th May the plaintiff filed a petition praying that he might be permitted to withdraw his claim for damages under section 373 of the Civil Procedure Code with liberty to bring a fresh suit, and that a decree might be made on the part of the claim dismissed by the order of the Court on 18th November 1902, but the petition was rejected by the District Judge.

Thereupon the plaintiff's pleader stated to the Court that the plaintiff withdrew from the claim for damages, but not from the claim for the recovery of the money paid, which he maintained had been decided by the Court and was not then under trial. He closed his case by stating that, with reference to the issues not yet decided, he did not think any finding on them necessary.

Counsel for the defendant Bank then claimed to be allowed to call his witnesses and give evidence on all the remaining issues, so that the Court might come to a decision under section 204 of the Civil Procedure Code on the issues raised. On that the Court held that the defendant was entitled to call his evidence and to have a finding on the issues.

The plaintiff's pleader thereupon stated that he ceased to appear further for the plaintiff. The plaintiff also, who was present in Court, stated that he appeared only as a witness, not as a plaintiff, and that he was aware that the consequences of his not appearing as plaintiff would be that the case must be dismissed in default. The District Judge then adjourned the case until the next day, informing the plaintiff at the same time that if he wished to continue the case the next day he would be allowed to do so.

On the next day, the 26th May, the plaintiff was absent, and his pleader, though present, said he had no instructions to appear, and the defendant appearing the Judge made the following order :—

“ I regret that I have no option in the case but to dismiss the case under section 102, Code of Civil Procedure, with costs in defendant's favour. I would merely note here finally that no application for a further adjournment has been made to me, though it was yesterday indicated to the plaintiff in my

order that such an application would be considered, and the case was adjourned till to-day expressly to give him time to consider the position he had chosen to take up."

From this decision the plaintiff appealed to the Chief Court, and on the hearing of the appeal by Mr. Justice Johnstone and Mr. Justice Rattigan, it was referred to a Full Bench of five Judges for decision of the question whether or not an appeal lay from an order under section 102 of the Civil Procedure Code.

On 8th June 1906, the Full Bench, by a majority of three to two (Mr. Justice Reid and Mr. Justice Chatterjee, the two senior Judges, dissenting), ruled that no appeal lay (1).

On the case being returned to the Division Bench, the plaintiff applied to the Court to treat the memorandum of appeal as a petition for revision under section 70 of the Punjab Courts Act (XVIII of 1884), inasmuch as it had been filed on the authority of a previous judgment of a Full Bench of the Chief Court (Punjab Record 1897, case No. 60.) deciding that an appeal did lie in such a case. The grounds stated for the exercise of the revisional jurisdiction were (a) that "the facts showed no default;" and (b) that "the plaintiff having withdrawn from the undisposed portion of the case, the District Judge was bound to have disposed of it on the application of withdrawal."

The Division Bench, however, declined to treat the memorandum of appeal as a petition for revision and dismissed the appeal with costs. After stating the facts, their judgment proceeded as follows :—

"These being the facts, are there any grounds upon which this Court is justified in revision in interfering with the order of the District Judge? We confess that we are unable to find any. Mr. Kirkpatrick argues that the claim for the recovery of Rs. 83,005 had been finally disposed of by the order of the 18th November 1902, and that consequently, when the plaintiff abandoned his claim as regards the Rs. 10,000 damages, the Court was bound to close the case and to pass a decree.

"In other words, that as soon as the plaintiff stated, on the 25th May 1903, that he withdrew from the claim *quoad* the Rs. 10,000, the Court had no jurisdiction to continue the hearing of the case. No doubt when a plaintiff withdraws absolutely from his suit, and gives it up entirely, the Court cannot

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proceed with the further hearing of it. But this is not what happened in this case. The District Judge had, by a preliminary order, decided that part of plaintiff's claim must fail, but, as he was careful to explain in two subsequent orders, which must have been thoroughly understood by the plaintiff and his advisers, the meaning of that order was not that plaintiff's suit was dismissed even in part, and that the Court's intention was merely that to the extent of that claim its finding on the preliminary issue, which was one of law, was against plaintiff. After that order was passed plaintiff went on with his case, and produced evidence on the other issues framed. When he had done so, and after defendant had called part of his evidence, plaintiff suddenly decided to abandon the second part of his claim, at the same time expressly stating that he did not withdraw from the other part. Under these circumstances, what was the proper course for the Court to adopt? The plaintiff had not withdrawn from the suit. He had, no doubt, abandoned part of his claim, but we know of no authority which lays it down as a principle of law that in a case where a plaintiff abandons part of his claim the Court is thereby debarred from continuing the hearing of the suit, even though as regards the other part of the claim it may have held, on a preliminary issue, that the plaintiff must fail. The Court's view on this preliminary issue may prove to be erroneous, and it is surely within its competency, especially if the defendant so desires, to go on with the case and to give a finding on the other issues in order to avoid the necessity of a remand. Section 204 of the Code provides that 'in suits in which issues have been framed the Court shall state its finding or decision, with the reasons thereof upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit.' In *Devarakonda Narasamma v. Devarakonda Kanaya* (1), it was held that there was nothing in this section to prevent the Court from deciding all the issues raised in a case, and in *Tarakant Banerjee v. Puddomoney Dossee* (2) their Lordships of the Privy Council remarked—'It is much to be desired that in all appealable cases the Courts below should, as far as may be practicable, pronounce the opinions on all the important points in order to avoid the possibility of a remand. To a like effect is the dictum in *Shib Charan Lal v. Raghu Nath* (3), and though the decisions of the High Court of Calcutta relied upon by Mr. Kirkpatrick [*Barhamdeo Narain Singh v. Mackenzie* (4) and *Nanda Lal Rai v. Bonomali Lahiri* (5)] may not be quite reconcilable with this view, we cannot hold that a Court acts without jurisdiction or with material irregularity if, in the exercise of its discretion, it proceeds to give a decision on all the issues framed by it, though its finding on any particular issue may be sufficient for the disposal of the case so far as that Court itself is concerned. In the present case the mere facts that plaintiff abandoned part of his claim and that as regards the other part of the claim the Court had decided on a preliminary issue of law, that the plaintiff must fail, did not preclude the Court, in our opinion, from giving its findings on the other issues of fact, especially in view of the fact that, after the passing of the order of the 18th

(1) (1881) I. L. R. 4 Mad. 134.

(3) (1895) I. L. R. 17 All. 174, 195.

(2) (1866) 10 Moo. I. A. 476, 488;

(4) (1884) I. L. R. 10 Cal. 1095.

5 W. R. (P. C.) 62, 66.

(5) (1885) I. L. R. 11 Cal. 544.

November 1902, and the framing of the other issues, the plaintiff had elected to give evidence in support of his case. But even if we must assume that it was under the circumstances of the case unnecessary for the Court to decide the other issues, we cannot on that account hold that the Court, in deciding that it ought to give findings upon those other issues, acted either with material irregularity or in excess of its jurisdiction, or without jurisdiction. The Court obviously thought that some, at all events, of the other issues were concerned with the part of the claim which, it had held upon a preliminary point of law, could not be established, and it accordingly decided to give a finding upon these issues. In so deciding it may have been wrong, but (without holding that its decision was wrong) are we to hold that its decision, even if erroneous, is open to revision? We cannot think so. At most all that can be urged is that the Court erred in law, but such error would not *per se* afford ground for this Court interfering on the revision side.

"Moreover, the course adopted by the plaintiff in this case puts him out of Court at once. Assuming that the Court was wrong in taking the course it did, it would have been open to the plaintiff to protest against its procedure, and to have thereafter made it a ground of appeal when (in the event of the decision of the Court upon the whole suit being against him) he had to prefer an appeal to the superior Court. The plaintiff, however, contumaciously declined to accept the ruling of the Court and refused to put in any further appearance in the case, with the inevitable result that his suit as a whole had to be dismissed in default.

"Upon a review of the facts we find ourselves unable to hold that this is a case in which we should be justified in interfering on the revision side, and we accordingly decline to entertain the memorandum of appeal as a petition for revision."

On this appeal,

Sir R. Finlay, K.C., DeGruyther, K.C., and G. C. O'Gorman, for the appellant, contended that the Chief Court was in error in dismissing the appellant's appeal. The appellant in his plaint made two claims,—one for a refund of money paid, and the other for damages,—which claims, though arising out of the same facts, were entirely distinct and separate and in no way dependent on one another. The first claim was finally disposed of by an order of the District Judge of 18th November 1902, and had a decree been passed in accordance with that order, the appellant would have had an undoubted right of appeal to the Chief Court from that decree. It was submitted, therefore, that when, on 25th May 1903, the appellant withdrew from his claim for damages, which alone was at the time before the Court, and at the same time reserved

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his rights in his claim for recovery of the money, the District Judge should have merely dismissed the suit. The fact that the appellant abstained from attending the taking of evidence on behalf of the respondent in a claim from which he, the appellant, had withdrawn, did not constitute such a non-appearance of the appellant as to justify the District Judge in dismissing the whole suit under section 102 of the Civil Procedure Code (Act XIV of 1882). The suit should have been dismissed, not for default under section 102, but on the merits, from which decree an appeal could have been brought as of right.

It was contended also that, even as the case stood, an appeal would lie from the order dismissing the suit for default under section 102 of the Code. On that point the High Courts in India had taken different views; but as regards the Punjab, a Full Bench of the Chief Court had, it was supposed, finally determined the question in the affirmative in case No. 60 reported in the Punjab Record for 1897. The question depended upon the meaning of the word "decree" in section 2 of the Civil Procedure Code. Reference was made to Civil Procedure Code, sections 2, 146, 154 and 373. The District Judge, moreover, had erroneously determined that the appellant had no right to recover the money paid. It was submitted that it was not a voluntary payment, but a compulsory one, made in order to release the appellants' property from a wrongful attachment in execution of a decree. Reference was made to the Contract Act (IX of 1872), sections 69, 70 and 72; *Fatima Khatun Chowdhurani v. Mahomed Jan Chowdhry* (1); *Dulichand v. Ramkishan Singh* (2); and clause (b) of section 72 of the Contract Act was referred to as being precisely applicable to the present case. When the case came before it, therefore, the Chief Court should have considered the appeal on its merits, having regard to section 70 of the Punjab Court's Act (XVIII of 1884) as amended by Act XXV of 1899, section 70 B; but it wrongly dismissed the appeal, and declined to act as a Court of Revision.

Levett, K.C., and *A. M. Dunne*, for the respondent Bank, contended that the order of 26th May 1903, dismissing the suit

(1) (1868) 12 Moo. I A. 65, 78.

(2) (1881) I. L. R. 7 Cal. 648.

under section 102 of the Civil Procedure Code, was under the circumstances correct, and that no appeal lay from that order. An order made under section 102 is not a determination of the case; it is a penalty on the plaintiff for not appearing, and is made to avoid a determination. It could not be a *res judicata*. It was not a "decree," but an order, and as such order was not one of those mentioned in section 588, there was no appeal from it; and under the circumstances the Judge could have done nothing else than what he did. Reference was made to Civil Procedure Code (Act XIV of 1882), sections 2, 102, 154, 157, 540 and 588. There was no prejudice to any one by the Judge's hearing the evidence on and deciding the other issues; it had in fact been laid down that that ought to be done in all cases: see *Tarakant Banerjee v. Puddomoney Dossee* (1), decided on a section of the Civil Procedure Code of 1859, similar to section 204 of the Code of 1882. The District Judge's order of 18th November 1902 was not a "decree," and no appeal lay from that order; he could not have drawn up a "decree" after it, nothing in the Code of Civil Procedure authorising him to do so. In two subsequent orders he stated that that order was not intended to be a determination of the case. He held that there was no "coercion" and that the payment was voluntary and could not be recovered from the respondent, and his decision, it was submitted, was not erroneous. Reference was made to the Contract Act, sections 15 and 72. There were no facts before the Chief Court entitling it to exercise its revisional jurisdiction, nor was any proper application made on which it could have exercised such jurisdiction, and the Chief Court was justified therefore in refusing to exercise its revisional jurisdiction.

Sir R. Finlay, K.C., replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This appeal has been brought against a judgment and decree of the Chief Court of the Punjab which affirmed the decision of the District Judge of Delhi.

(1) (1866) 10 Moo. I. A. 476; 5 W. R. (P. C.) 63.

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The circumstances out of which the appeal arises can be briefly stated, and, as in their Lordships' opinion, the case must go back to the Chief Court for further consideration, their Lordships think it desirable to say nothing about the case which is not absolutely necessary.

In the year 1902 a case was pending, in which the National Bank of India was plaintiff and the Delhi Cotton Mills Company, Limited, defendant, and on the 21st April of that year the Chief Court, on appeal, made a money decree in favour of the Bank for a sum of over Rs. 97,000 and interest. On the 25th June in the same year the premises and mills of the Cotton Mills Company were purchased, as a going concern, by the present plaintiff, at public auction, for a sum very much larger than the amount of the Bank's decree. On the 15th August in the same year the Bank, in execution of their decree, obtained an attachment of the premises purchased by the plaintiff, and possession was taken under that attachment. In the same month of August the present plaintiff filed a petition in the District Court alleging that the attachment was wrongful, and that he was compelled to pay the balance due under the Bank's decree. He paid into Court accordingly and thus released the property from the attachment. On the following day the now plaintiff filed a plaint against the Bank in the District Court, in which plaint he asked for two things—*first*, for a decree for the amount which he had paid to release the property from attachment; and, *secondly*, for damages on the ground of the illegality of the attachment.

It is unnecessary to follow in detail the proceedings in the case. It is enough to say that on the 18th November 1902 the District Court made an order deciding that the principal claim of the plaintiff, namely, that relating to the sum paid to release the attachment, was unsustainable in law. The learned Judge thus expressed himself :

"I therefore rule that the payment was entirely voluntary, and for plaintiff's own interests, and that his remedy is under sections 69 and 70 of the Contract Act against the Delhi Cotton Mills, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment."

Their Lordships are of opinion that, so far as concerns the recovery of the money paid to discharge the attachment, this order of the District Court was a full determination, adverse to the plaintiff, of his claim in that respect.

On the 3rd December 1902 the plaintiff petitioned that a decree might be drawn up embodying the dismissal of his claim for the money paid into Court. This petition was dismissed.

The claim for damages still remained, and evidence bearing upon it was proceeded with. On the 25th May 1903 the plaintiff asked to be allowed to withdraw his claim for damages under section 373 of the Civil Procedure Code (that is to say with liberty to sue again), and again asked that a decree should be drawn up with reference to the claim dismissed. These applications were refused; and thereupon the plaintiff absolutely withdrew from the claim for damages, but not from that for the recovery of the money paid.

After that the defendant proceeded to give evidence upon all the issues which had been raised, the plaintiff not appearing. In the result, the District Judge dismissed the whole case for default under section 102 of the Civil Procedure Code.

On appeal to the Chief Court, the majority of the learned Judges of that Court held that the suit having been dismissed under section 102 of the Civil Procedure Code, no appeal lay, and against that decision the present appeal has been brought.

Their Lordships are of opinion that the case should not be allowed to stand as it does now. As to the principal claim of the plaintiff, that relating to the money paid to release the attachment, there was in substance a clear decision of the District Judge adverse to the plaintiff; after which, in substance, no question as to that claim remained open in the Court of first instance.

As to the second claim, that for damages, the plaintiff having unconditionally abandoned his claim, there remained nothing in substance to be tried.

The case in their Lordships' opinion was one not proper to be dealt with under section 102 of the Civil Procedure Code.

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Their Lordships are of opinion that it is unnecessary to decide whether an appeal lies against a dismissal regularly made under section 102, because they think that that section was not applicable to the present case. They think it necessary that the case should go back to the Chief Court to decide the appeal upon its merits. In the course of the argument, several minor points were raised which it seems desirable to notice. One was with reference to the evidence already taken in the case, and the use to be made of that evidence. A second point was with reference to the refusal of the first Court to issue a commission. The third was with reference to the refusal of the Court to allow the cross-examination of a learned gentleman who had appeared as counsel in the earlier stages of the case. These are matters upon which it appears undesirable for their Lordships to express any opinion. Such matters can be dealt with by the Chief Court when considering the case on the merits.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court should be discharged with costs, and that the case should be remitted to that Court in order that the appeal to that Court may be heard and decided on its merits, and that the costs incurred in the District Court should abide the result of such appeal.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Sanderson, Adkin, Lee & Eddis.*

J. V. W.

CRIMINAL REFERENCE.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

EMPEROR

v.

LALIT KUMAR CHATTERJEE.*

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March 11.

Bail - Power of Sessions Judge to grant bail in cases to which special procedure has been applied—Criminal Procedure Code (Act V of 1898) ss. 497, 498—Criminal Law Amendment Act (XIV of 1908) ss. 12 & 14 (1).

The power of the Sessions Judge to grant bail under s. 498 of the Criminal Procedure Code is, in cases to which the provisions of Part I of Act XIV of 1908 have been applied by section 2 thereof, abrogated by section 14 of that Act.

ON the 31st January 1910 a first information report and a petition by the Superintendent of Police of Howrah were submitted against a number of persons, on a charge under section 400 of the Penal Code, to Mr. C. H. Reid, the Joint Magistrate of Howrah, who thereupon directed the issue of warrants against some of them. The petitioners were arrested on the same day and remanded to jail till the 14th February. As Mr. Reid was about to leave on transfer, the District Magistrate, Mr. H. T. S. Forrest, withdrew the case to his own Court on the 3rd February. On the same date an order was passed by the Lieutenant-Governor, under section 2 of Act XIV of 1908, applying the provisions of Part I to the case, but the order was not received by the District Magistrate till the 5th, and after he had already refused an application for bail under section 497 of the Criminal Procedure Code made on behalf of Lalit Mohan Chatterjee, Jotindra Nath Mookerjee and Nibaran Chunder Mozumdar. The three petitioners then applied to the Sessions Judge of Hooghly under section 498 of the Code, and he called for the records of the case and fixed the 11th for hearing. The District Magistrate, by his letter dated the 10th, refused to send the records, on the ground that section 498

*Criminal Reference Miscellaneous, No. 42A of 1910, by W. N. Delevingne, Sessions Judge of Hooghly, dated March 2, 1910.

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did not apply to an inquiry under section 3 (1) of Act XIV of 1908. The Sessions Judge replied, on the 12th, pointing out to him that he had taken an erroneous view of the law, but the latter persisted in refusing to forward the records and again denied the jurisdiction of the Judge in the matter. In the meantime an application for bail, on behalf of Lalit Kumar Chatterjee, was made to and refused by the Magistrate. The applications of the petitioners for bail were taken up by the Judge on the 22nd instant, and after hearing the Advocate General for the Crown and the applicants on the question of jurisdiction, he held that he had power under the Code to release the accused on bail, but, as he had no materials before him to enable him to decide on the merits, he submitted the case on the 2nd March to the High Court, soliciting its order as to whether the District Magistrate was warranted in refusing to send the records to his Court.

The Advocate-General (The Hon'ble Mr Kenrick, K.C.), and The Deputy Legal Remembrancer (Mr. Orr), for the Crown. The object of Act XIV of 1908, as the preamble shows, is to provide for a more speedy trial of certain offences, and a special jurisdiction is created by the Act and limited to the inquiring Magistrate and the three judges of the Special Bench. The power which the Sessions Judge would otherwise possess of trying the case is thus taken away. A commitment in ordinary cases would lie to the Sessions Judge, and hence power is given him of releasing on bail under section 498 of the Code, but commitments under the Act go to the Special Bench, and the elimination of the Judge as a trying Court indicates a deprivation also of his normal power of granting bail. This view is also consistent with the object of the Act. His powers under section 435 of the Code too are in such cases abrogated. Under section 4 of the former the accused need not be present, and cannot be represented by pleader, during the inquiry, and there is no right of access to the Court. If the Judge has jurisdiction under the Code to ascertain whether sufficient grounds of further inquiry exist, and if so to release on bail, section 4

would be rendered futile and nugatory. Section 498 of the Code is inconsistent with the special procedure under the Act, and does not, therefore, having regard to section 14 (1) of the latter, apply to an inquiry under section 3.

Mr. A. Chaudhuri (with him *Mr. J. N. Roy* and *Babu Narendra Kumar Bose*), for the petitioner. Section 498 of the Code confers the power of granting bail on both the High Court and the Sessions Judge in the same terms, and, therefore, as the jurisdiction of the former is not affected by the new Act, neither is that of the latter. The jurisdiction of a Court cannot be taken away by implication. Section 14 of the Act does not take it away in express terms. Section 12 of the Act qualifies only section 497 and does not touch section 498 of the Code. The power of the Judge under section 498 is not inconsistent with the special procedure under the Act requiring commitment to, and trial by, the Special Bench. The exercise of this power is independent of the power of holding a trial, as in the case of European British subjects charged with offences for which there must be a commitment to the High Court. It exists also under the terms of the section irrespective of appellate jurisdiction. Until the Magistrate is satisfied that the evidence is sufficient to justify a commitment to the Special Bench he proceeds under the ordinary law, because, if the evidence is not sufficient to put the accused on trial for a scheduled offence, but some other offence is made out, he is required by section 5 to "proceed accordingly." The subsequent proceeding, which is under the Code, is a continuation of the inquiry under the Act. Under section 435 of the Code the Sessions Judge can call for the records, and the Magistrate has no power to refuse to send them.

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STEPHEN AND CARNDUFF, JJ. This matter has been referred to us by the Sessions Judge of Hooghly in the following circumstances. Four persons were arrested in February last on a charge of having committed an offence under section 400 of the Indian Penal Code by belonging to a gang of dacoits. Part I of the Criminal Law Amendment Act, 1908, has been

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applied to proceedings in respect of this offence by the Local Government, at what time is not stated, but no doubt on the 5th February. On that day one of the petitioners applied to the District Magistrate of Howrah, who had taken cognizance of the offence, for bail, which was refused. On the 8th February he and two others of the accused applied, no doubt in pursuance of the provisions of section 498 of the Code of Criminal Procedure, to be admitted to bail by the Sessions Judge, who directed that the papers of the case should be called for and fixed a day for hearing the applications. Before the date so fixed the District Magistrate declined to forward the record, on the ground that the provisions of the Code of Criminal Procedure did not apply to the inquiry which he was conducting. The Sessions Judge adjourned the hearing of the applications to the 22nd February, when the Advocate General appeared before him and argued that he had no jurisdiction in respect of proceedings under Part I of the Act. On the 1st March the Sessions Judge held that he had such jurisdiction; but, as he had no materials before him on which to make an order, he has submitted the applications to us for orders.

On the 24th February a fourth accused applied to the Sessions Judge to be admitted to bail, and though the District Magistrate has not refused, not having been called on, to forward the papers in his case, and though no argument has been heard on it, his application stands on the same footing as the others, and we need not distinguish between the cases of any of the four petitioners.

No specific question is referred to us by the Sessions Judge, but we have heard counsel on the reference, and there is no doubt that the question we have to decide is whether the Sessions Judge was correct in holding that he had jurisdiction to grant bail in these cases. If he has, it is founded of course on section 498 of the Criminal Procedure Code, the material part of which provides that "the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail." The only restriction which it can be suggested should be placed on the

very wide power conferred on the Sessions Judge by this section is, for present purposes, that contained in section 14 (1) of the Criminal Law Amendment Act of 1908, which is as follows :—"The provisions of the Code of Criminal Procedure, 1898, shall not apply to proceedings taken under this Part, in so far as they are inconsistent with the special procedure prescribed in this Part."

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The question thus is whether the power of the Sessions Judge to grant bail in cases to which the Act does not apply, is inconsistent with the procedure prescribed by Part I of the Act; and we are of opinion that it is for the following reasons. The procedure prescribed by Part I of the Act is prescribed in sections 3 to 12, and an essential feature of it is that there shall be a commitment by the Magistrate directly to the High Court, and the power of the Sessions Judge to try the case, which he would have were it not for the Act, is taken away. This is consistent with the preamble of the Act, which recites that it is expedient to provide for the more speedy trial of certain offences, as the effect of the Magistrate committing to the High Court is to eliminate a trial by the Sessions Judge, and to provide that the accused should be tried at once, and finally, by the tribunal to which he would have a right of appeal if the ordinary procedure were followed, it being assumed that he would exercise this right if he were convicted by the Sessions Judge of one of the offences to which the Act applies. The elimination of the Sessions Judge as a trying Court seems to us to indicate that he is not to exercise his normal power of granting bail. The Act provides what is nearly a complete course of procedure. It does not give the Magistrate power to summon witnesses, which he must, therefore, do under the Criminal Procedure Code; but it casts on him a duty to record evidence, to discharge the prisoner in some circumstances, and to commit him to the High Court in others, and it does this as nearly as may be in the terms of the Code. This shows that the prescribed procedure is exclusive as far as it goes, and lends force to the argument that, if the jurisdiction of the Sessions Judge is eliminated for one purpose, it is eliminated for another. The taking away

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of the normal power of the Sessions Judge to grant bail is also consistent with the speedy trial recited in the preamble. We have already held, in *Emperor v. Sourindra Mohan Chuckerbutty* (1), that the power of this Court to admit to bail is not affected by the Act, and the taking away of this power from the Sessions Judge does not, therefore, deprive the accused of any right that he is entitled to, since he retains his power of applying for bail to a superior, and what we must regard as a more capable, tribunal.

Against this view several arguments have been urged, which are entitled to our best consideration, though we cannot accede to them. As we have already said, we have held that this Court has power to admit to bail in such cases as the present, and the same words that confer this power on the High Court confer it also on the Sessions Judge. But there is this great difference between the two that the former is, and the latter is not, the trying Court. It is not, of course, the case that the power to grant bail under section 498 of the Code is confined to a trying Court; for, if that were so, the powers of the Court of Sessions and of this Court under the section would be much narrower than they are. But, as we have pointed out in the other matter referred to, it can hardly be said that there is anything in the intervention of the High Court, by which cases under the Act are to be tried, that is inconsistent with the special procedure prescribed by it. Though, therefore, we feel the force of the argument addressed to us on the terms of section 498 of the Code, we cannot yield to it in view of the terms of section 14 (1) of the Act and the provisions that precede it.

Another argument that has been urged is that, until the Magistrate is satisfied that the evidence offered by the prosecution is sufficient to put the accused on his trial as provided in section 6, he is proceeding under the ordinary law, because his inquiry may result in it appearing to him that the accused should be tried or committed for trial under the provisions of the Code for some offence not in the Schedule to the Act, in

which case he must, under section 5 of the latter, "proceed accordingly," that is, try him or commit him for trial for that offence. This argument, however, proves too much; for its effect would be to nullify the provisions of sections 3 and 4, and we have no doubt that the proper reading of section 5 is merely to make it clear that a Magistrate who is proceeding under the Act may deal with an accused in the ordinary way, if he considers that an offence mentioned in the Schedule has not been made out and that another has. Whether a magisterial inquiry under the Act would justify a commitment under the Code, or whether another inquiry would be necessary for that purpose, we need not decide; but a second enquiry is at all events open to the Magistrate, and that fact deprives the argument of the accused on this point of any weight.

The result is that we must hold that the Sessions Judge had no jurisdiction to entertain the applications for bail that were made to him. We need hardly repeat, but may perhaps emphasize the fact, that they might properly have been made to us.

We regret to have to notice that, whatever the state of the law may be, the District Magistrate acted improperly in refusing to send the record to the Sessions Judge when requested to do so. The Judge was the superior judicial authority, and the question of his jurisdiction was for him in the first instance. He was entitled to ask for everything that he required in this case, and the District Magistrate had no right to refuse it; nor did he do so courteously.

Rule discharged.

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Before Mr. Justice Stephen and Mr. Justice Carnduff.

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Feb. 2.

JAFAR ALI PANJALIA

v.

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Surety for good behaviour—Fitness of surety—Pecuniary qualification, but not power of control—Grounds of rejection—Criminal Procedure Code (Act V of 1898) s. 122.

In determining the fitness of a surety under s. 122 of the Criminal Procedure Code, the first matter to be inquired into is his ability to pay the amount of the bond in case of default by the principal; but there may be other matters also to be considered as grounds of objection, which must be dealt with in each case as it arises.

Where a surety is competent in a pecuniary sense, the fact that he is not in a position to exercise control over the person bound down, so as to ensure his good behaviour in future, is not a sufficient ground for his rejection.

Ram Pershad v. King-Emperor (1), *Adam Sheikh v. Emperor* (2) and *Jalil A. Emperor* (3) referred to.

On the 8th March 1909, the petitioner was bound down to be of good behaviour in the sum of Rs. 5,000, with five sureties in the amount of Rs. 1,000 each, for two years, by Babu Panchu Gopal Mukerjee, Deputy Magistrate of Barisal. The Sessions Judge of Backergunge, on reference of the case to him under section 123 of the Code, modified the order by reducing the amount of the petitioner's bond to Rs. 2,500, with sureties not exceeding five in number, in the like total sum. On the 3rd August the petitioner surrendered before the Additional District Magistrate of Barisal, the Deputy Magistrate who had passed the original order under section 118 of the Code having been transferred, and offered five sureties in the sum of Rs. 500 each. The District Magistrate referred the question of their fitness to the Sub-Divisional Officer of Bhola who, after holding an

* Criminal Revision No. 1174 of 1909, against the order of J. N. Roy, District Magistrate of Backergunge, dated Aug. 23, 1909.

1) (1902) 6 C. W. N. 593.

(2) (1908) I. L. R. 35 Cal. 400.

(3) (1890) 13 C. W. N. 80.

inquiry in the matter and examining witnesses, submitted a report to the effect that the sureties were men of substance, from each of whom the sum of Rs. 2,500 was recoverable, that there was nothing against the character of four of them, though he had some doubt as to the fifth, as he was named by a witness during his inquiry as an associate of the petitioner in a criminal case, and as the petitioner had taken a settlement of a pound in his name, but that the petitioner was a rich and influential man in the locality, and the sureties would not be able to control him in his future conduct. On the receipt of the report the District Magistrate rejected the sureties, on the 23rd August, mainly on the ground of their inability to control the petitioner. An application against this order was made to, and refused by, the Sessions Judge of Backergunge by his order dated the 30th August. The petitioner then obtained the present rule from the High Court on the ground that there was no sufficient reason shown for refusing to accept the sureties. No objection was taken to the competency of the District Magistrate to determine the question of their fitness on the report of a Subordinate Magistrate instead of holding an inquiry himself in the matter.

Babu Gunada Charan Sen, for the petitioner. The District Magistrate was wrong in refusing to accept the sureties on the ground of their want of control over the petitioner when they were men of substance : see *Abinash Malakar v. Empress* (1), *Ram Pershad v. King-Emperor* (2) and *Adam Sheikh v. Emperor* (3). The ruling in *Jalil v. Emperor* (4) is distinguishable, as one of the sureties tendered was a member of the same gang.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown, relied on *Jalil v. Emperor* (4). Section 122 of the Code does not refer only to pecuniary fitness, as section 513 shows that a person bound to be of good behaviour is not allowed to deposit the amount of the bond in lieu of the recognizance.

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(1) (1900) 4 C. W. N. 797.

(2) (1902) 5 C. W. N. 593.

(3) (1908) I. L. R. 35 Calc. 400.

(4) (1890) 13 C. W. N. 80.

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STEPHEN AND CARNDUFF JJ. This is a rule calling on the District Magistrate to show cause why the securities offered by the petitioner should not be accepted. The petitioner has been ordered to be bound down under section 118 of the Criminal Procedure Code, and to find sureties for Rs. 2,500, the sureties being of such number, not exceeding five, as he may see fit. He has found five sureties, all of whom are of sufficient substance to be able to pay Rs. 2,500, but who are not, in the opinion of the Magistrate, in a position to control the petitioner sufficiently to ensure his good behaviour in future.

The question is whether the grounds on which these sureties have been refused by the Magistrate are sufficient. In our opinion they are not. In view of the judgments of this Court in the cases of *Ram Pershad v. King-Emperor* (1) and *Adam Sheikh v. Emperor* (2), it seems to be plain that the first matter to be enquired into is the ability of the sureties to pay the sums for which they become bound in case of default of the persons who are bound down. Beyond this, as is shown in the judgment in *Jalil v. Emperor* (3), there may be other matters to be considered which would be taken as objections to the sureties; as, for example, if one of a gang of thieves is offered as a surety for another. There may also be other objections to a man becoming a surety although he is pecuniarily fit for the position, but these it is not possible to specify, and such an objection must be dealt with in each case as it arises. In the present case the sureties being competent from the pecuniary point of view and no other cause of unfitness being shown, we think that they ought to be accepted. Under these circumstances, the rule is made absolute, and we order that the securities originally offered by the petitioner be accepted.

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Rule absolute.

(1) (1902) 6 C. W. N. 592

(2) (1908) I. L. R. 35 Calc. 400.

(3) (1908) 13 C. W. N. 80.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

JAHANDAR BAKSH MALLIK

v.

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Feb 8.

Landlord and Tenant—Enhancement of rent—Waiver—Bengal Tenancy Act (VIII of 1885), ss. 43, 108—Chur lands—Right of Occupancy.

A took a lease of a certain Government *khas mehal* and executed a *kabuliat* in favor of the Collector by which he (A) covenanted not to raise the rents of raiyats beyond the amounts mentioned in the settlement *jamabundi*. The tenants, however, subsequently agreed to pay rent at an enhanced rate on the ground that the fertility of the land had been increased. Upon a suit for arrears of rent at the enhanced rate against the tenants, the defence was that A was bound by the *kabuliat* executed in favor of the Collector, and as such he was not entitled to a decree at the rate claimed :

Held, that, inasmuch as the tenants voluntarily agreed to an enhancement of rent, they deliberately waived the benefit of the said covenant, and they could not impeach the validity of their own agreement on this particular ground.

Zamir Mandal v. Gopi Sundari Dasi (1) referred to.

Under section 180 of the Bengal Tenancy Act, a raiyat holding a *chur* land, but who has not acquired a right of occupancy, is liable to pay such rent for his holding as may be agreed on between him and his landlord, irrespective of the provisions of section 43 of the Act.

SECOND APPEALS by the plaintiff, Jahandar Baksh Mallik.

These appeals arose out of suits brought by the plaintiff for recovery of arrears of rent. The plaintiff took a settlement from the Government of a *khas mehal*, mouzah Balliarchak, and on the 13th December 1902 executed a *kabuliat* in favour of the Collector. The lease was to continue for a term of 20 years from the 1st of April 1901 to 31st of March 1921. By the terms of the *kabuliat* the plaintiff undertook not to raise the rents of the raiyats for the lands settled with them beyond

* Appeals from Appellate Decrees, Nos. 2246, etc., of 1907, against the decrees of F. Roe, District Judge of Hooghly, dated May 31, 1907, modifying the decrees of Debendra Nath Pal, Munsif of Amta, dated Dec. 21, 1906.

(1) (1900) I, L. R. 32 Cal. 463 (note).

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the amounts entered in the settlement *jamabundi*, and that he would collect rent from the raiyats according to law and the terms of his engagement with the Government. It appeared that in 1904 the tenants agreed to an enhancement of rent on the ground that the fertility of the land had been increased by an alluvial deposit thereon. On the 17th of April 1906 the plaintiff brought these suits for arrears of rent against the tenants at the enhanced rate.

Defendants pleaded, *inter alia*, that under the terms of the settlement by Government the plaintiff was not competent to raise the rents beyond the amounts entered in the settlement *jamabundi*, that they had occupancy rights in the land from a time long before the date of settlement taken by the plaintiff, and that they never agreed to pay the enhanced rent.

The Court of first instance holding that the defendants voluntarily agreed to pay the enhanced rate of rent, the enhanced rate would be binding upon them and decreed the plaintiff's suit. On appeal, the learned District Judge overruled the objections of the tenants that they never agreed to pay the enhanced rent, but having held that the plaintiff was precluded by the terms of his engagement with Government from realising rents at rates higher than those mentioned in the settlement *jamabundi*, set aside the decision of the first Court.

Against this decision the plaintiff appealed to the High Court

Dr. Rashbehary Ghose (with him *Babu Mahendra Nath Roy*, *Babu Krishna Prosad Sarbadhicary* and *Moulvie Sourghat Ali*), for the appellants. The tenants were not parties to the covenant which was between the landlord and the Government; on principle they cannot enforce it: *Gour Chandra Saha v. Mani Mohan Sen* (1) and *Zamir Mandal v. Gopi Sundari Dasi* (2). It is for the Government to take action or not if there has been a breach. As a matter of fact, the judgment of the District Judge shows that the tenants appealed to the Collector and the Collector refused to interfere. Besides, the *labuliat* has not been properly construed by the District Judge.

(1) (1905) I. L. R. 32 Calc. 463. (2) (1900) I. L. R. 32 Calc. 493 (note).

The covenant occurs in nearly all leases executed by the East India Company with zemindars at the beginning of the last century. It is the common form which has survived in Government leases, although the necessity for such covenants no longer exists. The covenant could not have been intended to be enforced.

Babu Naliniranjan Chatterjee (with him *Babu Nagendra Nath Ghose* and *Babu Biraj Mohan Majumdar*), for the respondents, submitted that the clause was deliberately inserted in the lease for the protection of the tenants, and they were entitled to enforce it: see Pollock's Indian Contract Act, 1st edition, page 15. The cases cited by the other side are distinguishable. I rely on *Chandramoni Mohanti v. Manmatha Nath Mitter* (1) as also on the case of *Tapanidhi Raghunath Puri v. Pitambar Gajendra Mahapaty* (2). Moreover, section 29 of the Bengal Tenancy Act was a bar to the suit. The tenants claimed to be occupancy raiyats. Under section 20, clause (7) of the Bengal Tenancy Act, the Court should have presumed that the tenants had occupancy rights in the lands.

Dr. Ghose, in reply.

Babu Mahendra Nath Roy, for the appellants, in reply to a question put by the Court, submitted that there were no registered agreements in these cases; but as the lands appeared to be *chur* lands, the agreements were enforceable under section 180, clause (1), sub-clause (b) of the Bengal Tenancy Act, and section 43 of the Act did not apply.

Babu Naliniranjan Chatterjee. Section 180, clause (1), sub-clause (b) of the Act did not exclude the application of Chapter VI to *chur* lands. Clause (2) specifically excluded Chapter VI in the case only of holdings created under the *utbandi* system. Besides, there is no finding that the land is *chur*, and in any case the question could not be decided without an enquiry as to whether the tenants had acquired occupancy rights or not when the agreements were entered into.

Cur. adv. vult.

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(1) (1903) 11 C. L. J. 68.

(2) (1906) 5 C. L. J. 67.

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MOOKERJEE AND TEUNON JJ. In these appeals, preferred by the plaintiff in the Court below, the sole point in controversy between the parties relates to the amount of rent annually payable by the defendants in respect of their several holdings. The lands comprised in the tenancies are situated in Government *khas mehal*, mouzah Balliarchak, in the district of Hooghly. The plaintiff is a settlement-holder, and as *ijaradar* he executed a *kabuliat* in favour of the Collector on the 13th December 1902. This lease was to continue for a term of 20 years from the 1st April 1901 to the 31st March 1921. The document recited that the farmer would collect rents from the raiyats according to law and the terms of his engagement with Government. He also undertook not to raise the rents of the raiyats for the lands settled with them beyond the amounts entered in the settlement *jamabundi* which had been prepared on the 30th June 1902, and admittedly furnished the basis on which the rent payable by the plaintiff to Government was calculated. The lease concluded with a statement by the lessee that if he violated the conditions of the lease, the Collector would be at liberty to cancel the lease and take *khas* possession of the *mehal*. The defendants had been tenants in occupation of their respective holdings long before the settlement with the plaintiff made on the 13th December 1902, and the rents payable by them were duly entered in the settlement *jamabundi*. The plaintiff alleged in the Court below—and his allegation has been accepted by the District Judge—that in 1904 the tenants agreed to an enhancement of their rents on the ground that the fertility of the lands had been increased by an alluvial deposit thereon. On the 17th April 1906 the plaintiff commenced these actions for recovery of arrears of rent at the enhanced rates agreed upon by the parties. The defendants resisted the claim on the grounds that they had never agreed to any enhancement of the rent, and that, even if they had done so, the agreements were not enforceable, as under the terms of the settlement by Government it was not competent to the plaintiff to raise the rents beyond the amounts entered in the settlement *jamabundi*. They also stated that they had

occupancy rights in the lands from a time long anterior to the settlement taken by the plaintiff. The Court of first instance stated the principal questions in controversy between the parties to be, whether the defendants had agreed to pay the enhanced rent as claimed against them, and whether they were liable to pay at higher rates than those settled by Government. Upon the first question, the Court of first instance found that the defendants had agreed to an enhancement of the rent. Upon the second question, it found that the rents had not been settled by the Government Officers, but added that, if the contrary view prevailed, the enhanced rates would be binding upon those tenants who had voluntarily agreed to them. The defendants appealed against this decision, and the District Judge has allowed their appeals. He has overruled their contention that they had never agreed to pay enhanced rents, and has found expressly that they agreed in 1904 to pay higher rates than before. The learned District Judge, however, has found that the plaintiff is precluded by the terms of his engagement with Government from realising rent at rates higher than those mentioned in the settlement *jamabundi*. The plaintiff has appealed against this decision, and on his behalf the decrees of the District Judge have been assailed substantially on two grounds: namely, *first*, that the tenants, who were no parties to the engagement between the plaintiff and Government, are not entitled to enforce any of its terms; and, *secondly*, that upon a true construction of the purpose and effect of the particular covenant in the lease of the plaintiff, it does not invalidate any agreement voluntarily made by the tenants for enhancement of the rents, specially when such agreement is in settlement of a *bonâ fide* dispute as to the amount of rent payable by them. In answer to this argument, it has been contended on behalf of the defendants, *first*, that the tenants, though strangers to the contract between the plaintiff and Government, are entitled to claim performance of a covenant inserted in the lease for their benefit and protection, and that in any view, as the rights of the plaintiff are restricted by the terms of the settlement granted by Government, he cannot receive a wider measure of

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relief than what is indicated thereunder ; and, *secondly*, that as the defendants were occupancy raiyats, any enhancement in contravention of section 29 of the Bengal Tenancy Act was inoperative in law.

In support of the first contention of the appellant, reliance has been placed upon the cases of *Zamir Mandal v. Gopi Sundari Dasi* (1), *Gour Chandra Saha v. Manimohan Sen* (2) and *Zamir Mandal v. Tarini Charan Singh* (3). On behalf of the respondents, on the other hand, reliance has been placed upon the cases of *Tapanidhi Raghunath Puri v. Pitambar Gajendra Mahapaty* (4) and *Chandramoni Mohanti v. Manmatha Nath Mitter* (5). The learned vakil for the appellant has suggested that there is a conflict between the two sets of decisions, and that a reference to a Full Bench should be made upon the question whether a stranger to a contract is entitled to claim performance thereof, in so far as it is for his benefit. It may be conceded that at first sight there does appear to be a conflict between the two sets of cases ; but a closer examination of the judgments shows that the apparent divergence is due to a fundamental difference between the circumstances which led to the two series of litigations. In the first class of cases upon which reliance is placed by the appellant, the landlord sought to enforce a contract for payment of enhanced rent into which the tenant had voluntarily entered, although the terms of the engagement between the landlord and Government provided that the former would not collect rent from the tenants at a rate higher than that mentioned in the settlement papers. The true question, therefore, which required decision was whether the tenant, after he had voluntarily agreed to pay enhanced rent, could question the validity of the contract on the ground that it was in contravention of the terms of the engagement between his landlord and Government. The learned Judges held that section 9 of Regulation VII of 1822 did not render illegal an agreement by a tenant to pay a higher rent than what is specified in the settlement papers. No doubt there are

(1) (1900) I. L. R. 32 Calc. 463 (note). (3) (1898) 11 C. L. J. 60.

(2) (1905) I. L. R. 32 Calc. 463. (4) (1906) 5 C. L. J. 67.

(5) (1903) 11 C. L. J. 68.

isolated sentences in the judgment of Sir Francis Maclean in the case of *Zamir Mandal v. Gopi Sundari Dasi* (1), in which the learned Chief Justice observes that, quite apart from authority, it is difficult to see how upon principle the existence of the contract between the plaintiff and Government can prevent him from enforcing the contract which the defendants have entered into with him. The additional reason thus indicated appears to be based on the doctrine that where two persons make a contract, in which one of them promises to confer a benefit upon a third party, the latter cannot seek to enforce the contract. It is clear, however, that the principal reason for the decision is the one already stated. In the second class of cases upon which the defendants before us rely, the landlord sought to eject the tenant in contravention of the terms of his engagement with Government. In this class of cases, therefore, the landlord did not seek to enforce an agreement voluntarily entered into by the tenant in contravention of the terms of the engagement between himself and Government, but he merely claimed to exercise a right of ejectment which he did not possess under the terms of the lease obtained by him from Government. In this second class of cases, therefore, the question does really arise whether a stranger to a contract is entitled to claim performance of a covenant inserted therein for his benefit or protection. If this question did really arise in the cases before us, the matter would require careful consideration, because, as is well known, there has been considerable divergence of judicial opinion upon the question of the right of a third person to enforce performance of a contract made for his benefit between others and to the consideration of which he is a stranger. In England, the rule is well settled that, subject to certain exceptions which may briefly be described as cases of trust, *Gregory v. Williams* (2), *Touche v. Metropolitan Railways Warehousing Company* (3), *Gandy v. Gandy* (4), quasi contract, *Williams v. Everett* (5), or near relationship, *Dutton v. Poole* (6),

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(1) (1900) I. L. R. 32 Calc. 463 (note). (4) (1884) 30 Ch. D. 57.

(2) (1817) 3 Mer. 582.

(5) (1811) 14 East 582; 13 R. R. 315.

(3) (1871) L. R. 6 Ch. App. 671.

(6) (1689) 2 Lev. 210.

Bourne v. Mason (1), where two persons make a contract in which one of them promises to confer benefits upon a third party, the latter cannot enforce performance thereof : *Laws of England* edited by Lord Halsbury, Volume VII, page 342, section 705 ; *Price v. Easton* (2), *Tweddle v. Atkinson* (3), *Eley v. Positive Security* (4), *Fleming v. Bank of New Zealand* (5), *Keighley, Maxsted & Company v. Durant* (6), *Cavalier v. Pope* (7), *Cameron v. Young* (8). In America, on the other hand, the rule is more elastic, and on general principles of law it has been held that, subject to certain exceptions, a person may maintain an action on a contract made for his benefit, although not a party to the contract, if he is a party to the consideration or has some legal or equitable interest in its performance : *Hendrick v. Lindsay* (9), *Davis v. Patrick* (10), *St. Louis v. Grand Lodge* (11). If, therefore, the question did require decision in the present cases, and the matter was discussed as one of principle, it would require careful examination, specially when we find that there is no distinct statutory provision on the subject. In the view, however, which we propose to take, the decision of this question becomes unnecessary. A covenant of the description now before us, by which the landlord, lessee under Government, is made to undertake not to collect rent at a higher rate than what is specified in the settlement papers, may be assumed to have been inserted for a twofold reason : namely, *first*, for protection of the Government revenue ; and, *secondly*, for the protection of the tenantry. The revenue payable by the settlement-holder is based upon the amount of rent realisable from the tenants in actual occupation of the land. Again, so far as these latter are concerned, the Government, who has settled their rents, may be desirous that they should not be pressed by an enhanced rent during the currency of a particular settlement. Now, so far as the first of the two reasons is con-

(1) (1680) 1 Ventris 6.

(2) (1833) 4 B. & Ad. 433.

(3) (1861) 1 B. & S. 393.

(4) (1876) 1 Ex. D. 88.

(5) [1900] A. C. 577.

(6) [1901] A. C. 240.

(7) [1906] A. C. 428.

(8) [1908] A. C. 176.

(9) (1876) 93 U. S. 143.

(10) (1886) 122 U. S. 138.

(11) (1878) 98 U. S. 123.

cerned, the matter is manifestly one between Government and the lessee ; if the latter succeeds in his endeavour to increase the collections, the Government may cancel the engagement with him (as provided in his lease) or may possibly enhance the revenue payable by him. In so far as the second reason is concerned, if the covenant has been deliberately inserted for the protection of the tenant, it may be argued with considerable force that it is not a matter of indifference to him whether it is obeyed or ignored. But here another consideration obviously arises. In so far as the covenant is for his benefit, he may surely waive it, for it is an elementary principle that every one may forego a right introduced for his own benefit, if it can be relinquished without prejudice to the community at large : *Yaw v. Kerr* (1). If, therefore, a party deliberately waives a legal right to which he is entitled, and no question of contravention of public policy or morality arises, such waiver is operative. In other words, if the waiver is supported by an agreement founded on a valuable consideration, or is of such a character as to estop the party from insisting on the right claimed to have been relinquished, the party who has waived his right cannot subsequently turn round and claim to enforce the right he has deliberately waived. This is the principle which underlies the decision in *Zamir Mandal v. Gopi Sundari Dasi* (2) and which clearly applies to the circumstances of the present case. According to the facts found by the Courts below, in July 1904 the defendants voluntarily agreed to an enhancement of the rents previously payable by them ; their denial to the contrary is false. Apart, therefore, from the question whether, to a possible action for enhancement of rent, the defendants might successfully have urged the particular covenant in the terms of engagement between their landlord and the Government, it is manifest that as they have deliberately waived the benefit of that covenant, they cannot impeach the validity of their own agreement on this particular ground. We must consequently hold upon the first ground urged by the appellant that the agreements for enhancement of rent are

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(1) (1864) 11 Wright Pa. 333.

(2) (1900) I. L. R. 32 Calc. 463 (note).

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binding upon the tenants, if they are not illegal on any other ground. This leads us to the consideration of the second ground urged by the appellant, and the answer thereto suggested on behalf of the respondent.

So far as this second point is concerned, it is clear from the pleadings in the Court of first instance that the defendants set up a right of occupancy in their holdings. It must be conceded, however, that the question does not appear to have been expressly raised as to whether the agreements for payment of enhanced rents were in contravention of the statutory provisions on the subject. On behalf of the respondent, it has been suggested that under section 20, clause 7 of the Bengal Tenancy Act, the presumption is that they had been in occupation for twelve years continuously and had thus acquired the status of occupancy raiyats. This contention, however, is obviously fallacious. In the first place, the presumption mentioned in clause 7 of section 20, arises only in proceedings under the Act, and as ruled by this Court in *Mulluck Chand Das v. Satis Chandra Das* (1) upon the authority of the decision of the Judicial Committee in *Pramada Nath Roy v. Ramani Kanta Roy* (2), a suit for rent is not a proceeding under the Bengal Tenancy Act. In the second place, even if clause 7 were applicable, it would be of no avail to the defendants, because the only presumption would be that they were occupancy raiyats at the date of the commencement of the suits, whereas to make section 29 applicable to the particular contracts for enhancement of the rent, it must be established that the respondents were occupancy raiyats on the dates when the respective agreements were made. Under these circumstances, the learned vakil for the appellant has contended that no further opportunity should be given to the defendants to establish their objection. After anxious consideration of the circumstances of the cases, we are not prepared to fall in with this suggestion. If there has been in fact an enhancement of the rent in contravention of the law, it is clear that the position of the defendants may be seriously and permanently prejudiced. A full investigation therefore

(1) (1909) 11 C. L. J. 56,

(2) (1907) I. L. R. 35 Calc. 331,

of the question is desirable, especially as the materials on the record are not sufficient for a proper adjudication of the matter in controversy.

We are further informed that in these cases there were no registered agreements for enhancement of rent, and that the tenants merely signed their names to what is called the *bilibandi* papers of the plaintiff. Consequently, if the defendants are proved to have acquired a right of occupancy at the date of the alleged agreement for enhancement of rent, section 29 would render such agreement wholly inoperative. Again, if the defendants are proved to have been non-occupancy raiyats, to whom the provisions of Chapter VI apply, the agreements for enhancement would be equally inoperative under section 43. The learned vakil for the plaintiff-appellant has, however, contended that section 43 is not applicable by reason of the provisions of section 180. That section—we quote only so much of it as applies to the cases before us—provides as follows :

“Notwithstanding anything in this Act, a raiyat who holds land of the kind known as *chur* or *dearah* shall not acquire a right of occupancy in the *chur* or *dearah* land until he has held the land in question for twelve continuous years ; and until he acquires a right of occupancy in the land, he shall be liable to pay such rent for his holding as may be agreed on between him and his landlord.”

On behalf of the appellant it has been contended that the lands in respect of which enhanced rent is claimed are *chur* lands within the meaning of section 180. This has been disputed on the side of the respondents, and it has further been urged on their behalf that section 180 does not affect the applicability of section 43. An attempt has been made to induce us to come to a determination upon the question of the character of the lands. In our opinion this matter requires further investigation upon evidence to be adduced by both the parties ; but if it is proved that the lands are really *chur* lands, the question arises for decision, how far section 43 is affected by section 180. This question appears to be one of first impression, and the language of section 180, sub-section 1,

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is not altogether free from ambiguity. But after careful consideration of the arguments addressed to us, we are of opinion that the introductory words "notwithstanding anything in this Act" govern the whole of the remainder of the sub-section, including the clause about payment of rent during the period preceding the acquisition of a right of occupancy. It has been suggested on behalf of the respondents that if this interpretation were adopted, sub-section 2 might be deemed to be superfluous. To this two answers may be given : namely, *first*, that sub-section 2 might have been introduced by reason of excessive caution ; and, *secondly*, that while sub-section 2 makes the whole of Chapter VI inapplicable to *utbandi* tenants, sub-section 1 makes only such portion of Chapter VI inapplicable to *utbandi* tenants and *dearah* tenants as relates to the payment of rent before the lapse of twelve years. In our opinion, it is fairly clear that during the twelve years which must elapse before a right of occupancy is acquired, the tenant is liable to pay the rent agreed upon irrespective of the provisions of section 43.

The result therefore is that these appeals must be allowed, the decrees of the District Judge set aside, and the cases remanded to him. He will first determine whether the lands of the disputed holdings are *chur* lands within the meaning of section 180. If it is found that the lands are not *chur* lands, the agreements for enhancement of rent must be held inoperative, because, whether the defendants had or had not acquired a right of occupancy at the time of the agreements, they are inoperative under section 29 or section 43. If, on the other hand, it is established that the lands are *chur* lands within the meaning of section 180, the question will arise whether, at the dates of the agreements, the tenants had acquired a right of occupancy by possession for twelve continuous years. If they had attained the status of occupancy raiyats at that time, the agreements for enhancement of rent must be treated as inoperative under section 29. If it is found that the tenants at that time had not acquired a right of occupancy, the agreements must be treated as valid under section 180. It will not be necessary to determine the truth or otherwise of the allegation

of the plaintiff that the enhancement was in settlement of a *bonâ fide* dispute, because, if the agreement is inoperative by reason of section 29, clause (a), no question arises as to the applicability of the principle recognized in *Kedar Nath Hazra v. Maharaja Manindra Chandra Nandi* (1) as controlling the operation of section 29, clause (b). As the questions to be investigated by the District Judge do not appear to have been directly raised and tried in the Court of first instance, the parties will be at liberty to adduce evidence in support of their respective allegations. The District Judge will direct such evidence to be taken by the Court of first instance under Order 41, Rule 25, and when the findings are returned by that Court, will proceed to decide the appeals in accordance with the directions given in our judgment. The costs of these appeals will abide the result.

S. C. G.

*Appeals allowed ;
cases remanded.*

(1) (1909) 11 C. L. J. 106.

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APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Doss.

SARADA CHARAN CHAKRAVARTI

v.

DURGARAM DE SINHA.*

1910
Feb. 23.

Limitation Act (XV of 1877) s. 20—Payment of interest on behalf of minor by manager of a joint Hindu family, effect of—"Duly authorised Agent."

A payment of interest by the manager of a joint Hindu family consisting of himself and his minor brothers, is a payment by the "duly authorised agent" of the minors within the meaning of section 20 of the Limitation Act, 1877.

SECOND APPEAL by the defendants, Sarada Charan Chakravarti and others.

* Appeal from Appellate Decree, No. 975 of 1908, against the decree of M. Yusuf, District Judge of Noakhali, dated Jan. 24, 1908, reversing the decree of Kumud Kanta Sen, Munsif of Sudharam, dated Jan. 31, 1907.

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This appeal arose out of an action brought by the plaintiff to enforce a mortgage bond which was executed on the 28th of Agrahayan 1293 B.S. (13th December 1886) by the father of defendants Nos. 1 to 4. It appeared that in order to avert a suit brought by the plaintiff, the defendant No. 1, on the 26th of Chaitra 1305 B.S. (8th April 1899), paid a certain sum of money towards interest due on the bond, and an endorsement of this payment was duly made on the bond. When the interest was paid, the defendant No. 2 was of age, but the defendants Nos. 3 and 4 were minors. The present suit was brought on the 24th November 1905.

Defence was, that the suit was barred by limitation.

The Court of first instance gave the plaintiff a decree against defendant No. 1 only, holding that the suit as against the others was barred by limitation. On appeal by the plaintiff, the lower Appellate Court decreed the entire claim against all the defendants.

Against this decision the defendants Nos. 2 to 4 appealed to the High Court.

Babu Baikuntha Nath Das, for the appellants. Plaintiff's case was that the payment was made by defendant No. 1 as guardian of the other defendants. The mother being alive, the signature of defendant No. 1 could not convey any property of the minors. The payment was not for the benefit of the minors, because the result has been an enormous increase of the debt. The manager of a joint Hindu family has no authority to acknowledge a debt on behalf of the other members of the family : *Kumarasami Nadan v. Pala Nagappa Chetti* (1). In the Full Bench case of *Chinnaya Nayudu v. Gurunatham Chetti* (2) the question did not arise. I rely also on the cases of *Hunooman Persaud Panday v. Munraj Koonweree* (3) and *Miller v. Runga Nath Moulick* (4). The manager of a Hindu family is not an agent, but a trustee : see Cowell's Tagore Law Lectures (1870), page 108, and also the cases of *Annamalai*

(1) (1878) I. L. R. 1 Mad. 385.

(3) (1856) 6 Moo. I. A. 393.

(2) (1882) I. L. R. 5 Mad. 169.

(4) (1885) I. L. R. 12 Calc. 389.

Chetty v. Murugasa Chetty (1) and *Muhammad Askari v. Radhe Ram Singh* (2). Even the guardian has no authority to acknowledge a debt: *Wajibun v. Kadir Buksh* (3), *Chhato Ram v. Bilito Ali* (4) and *Aghore Nath Mukhopadhyaya v. Grish Chunder Mukhopadhyaya* (5).

Babu Ramesh Chandra Sen, for the respondents. The mortgage-debt is one and indivisible, and payment by one keeps it alive against all. The defendants are in the position of co-mortgagors, and section 21 of the Limitation Act indicates that a payment made by a co-mortgagor keeps the debt alive against all. Section 20 does not say that a payment under the section saves limitation only against the person making the payment. The cases of *Krishna Chandra Saha v. Bhairab Chandra Saha* (6), *Domi Lal Sahu v. Roshan Dobay* (7) and *Chinnery v. Evans* (8) support my contention. The manager of a Hindu family has the same authority to acknowledge a debt as to borrow for family necessity, and the Dayabhaga and the Mitakshara lay down the same rule in this respect: see G. C. Sirkar's *Hindu Law*, pages 131-2. Section 21, subsection (1) of the new Limitation Act (IX of 1908) now expressly mentions a manager and a lawful guardian as "duly authorised agents" within the meaning of section 20 of the Act. The position of a manager is not exactly that of a trustee: *Annapagauda Tammangauda v. Sangadigyapa* (9), *Kailasa Padiachi v. Ponnukannu Achi* (10).

Babu Baikuntha Nath Das, in reply.

Cur. adv. vult.

CASPERSZ AND DOSS JJ. On the 28th Agrahayan 1293, Mohesh Chandra Chuckerbutty, father of the defendants Nos. 1 to 4, executed the mortgage bond in suit. On the 26th Chaitra 1305, the defendant No. 1 paid Rs. 5 towards interest due on the bond: this he did to avert a suit about to be brought by

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| (1) (1903) I. L. R. 26 Mad. 544. | (6) (1905) I. L. R. 32 Calc. 1077. |
| (2) (1900) I. L. R. 22 All. 307. | (7) (1906) I. L. R. 33 Calc. 1078. |
| (3) (1886) I. L. R. 13 Calc. 292. | (8) (1864) 11 H. L. C. 115. |
| (4) (1898) I. L. R. 26 Calc. 51. | (9) (1901) I. L. R. 26 Bom. 221. |
| (5) (1892) I. L. R. 20 Calc. 18. | (10) (1894) I. L. R. 18 Mad. 456. |

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the plaintiff, and an endorsement was duly made on the bond in the presence of a pleader who arranged the matter between the parties. The suit giving rise to this appeal was instituted on the 24th November 1905, and it is barred against the defendants Nos. 2 to 4 unless the payment of interest be held to have given the plaintiff a fresh starting point as provided by section 20 of the Limitation Act, XV of 1877. It appears that the second defendant was of age when his brother paid the item of interest. The third and fourth defendants are still minors.

The Court of first instance gave a decree against the defendant No. 1 only. The lower Appellate Court decreed the entire claim against all the defendants, of whom the defendants Nos. 2 to 4 are the appellants before us.

It is urged (i) that the defendant No. 1 was sued as the guardian of his brothers, and not as the manager of their family property, and that he was not their guardian when he paid the interest; (ii) that the defendant No. 1 did not make the payment either as guardian or as manager; (iii) that the defendant No. 1 was not the duly authorised agent of his brothers in paying the interest; and (iv) that the payment of interest was not for the benefit of the minors.

The suit was brought against all the defendants as heirs of the original debtor, the defendant No. 1 being treated as the manager of the joint family property, and the suit proceeded on that basis in the lower Courts. The payment of Rs. 5 averted the threatened suit: it was for the benefit of the younger brothers, including the minors, of whose property the defendant No. 1 was, in fact, the guardian, though he had not been appointed by the Civil Court. We, therefore, overrule the first, second and fourth contentions on the facts found.

The remaining argument leads to a consideration of the law and authorities. Section 20 of the Limitation Act, XV of 1877, provides that, "when interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt, or by his agent duly authorised in this behalf, a new period of limitation shall be computed from the time when payment was made" (we quote the necessary words

only). Was the defendant No. 1 the duly authorised agent of the defendants Nos. 2 to 4 in paying the interest, or did he pay it on his own behalf alone? In our opinion, he was their agent within the meaning of section 20.

The reported cases deal with various combinations of circumstances. In some cases the authority of a guardian was discussed. In other cases questions of legal necessity or of the debt being barred arose.

We proceed to notice the cases more directly in point, as also the decision of the Allahabad High Court in *Ram Charan Das v. Gaya Prasad* (1), where the authorities have been collected.

A Full Bench of the Madras High Court held in *Chinnaya Nayudu v. Gurunatham Chetti* (2), that the manager of a Hindu joint family has the same authority to acknowledge as he has to create a debt; he would have like power to continue a liability, as by payment of interest, and, in so doing, he would not be the partner of the other members of the family, but their agent. The powers of the manager of a joint Hindu family, as compared with those of an agent, are in regard to certain matters wider; while, as regards others, they are of a more limited character. The manager, being the accredited agent of the family, is authorised to bind them for all necessary purposes within the scope of his agency. It was pointed out by Mr. Justice Banerjee, in *Ram Charan Das v. Gaya Prasad* (3), that the manager of a joint Hindu family is something more than a mere agent, but that under the Limitation Act he must be regarded as an agent by operation of law for the purpose of acknowledgment of debts on behalf of minor members of the family.

The Full Bench decision of the Madras High Court was followed in *Bhasker Tatya Shet v. Vijalal Nathu* (4) and in other cases: we are of opinion that the manager of a Hindu family is duly authorised to bind the members in continuing the existence of valid debts. That this is the correct view may

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(1) (1908) I. L. R. 30 All. 422.

(3) (1908) I. L. R. 30 All. 422, 437.

(2) (1882) I. L. R. 5 Mad. 169.

(4) (1892) I. L. R. 17 Bom. 512.

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be inferred from the terms of the amended section 21 of the Limitation Act, IX of 1908.

The third contention, therefore, on behalf of the defendants appellants must fail. But the learned vakil for the plaintiff respondent has called our attention to the case of *Krishna Chandra Saha v. Bhairab Chandra Saha* (1) followed in *Domilal Sahu v. Roshan Dobay* (2), and he has argued that the mortgage debt incurred by the father of the defendants was binding on the family, any member of which could acknowledge the obligation or make a payment on behalf of all. We are disposed to accept this argument in support of the judgment of the lower Appellate Court. The entire equity of redemption descended to the sons of the mortgagor: they were jointly liable for the debt, not as co-mortgagors, but as representing the sole mortgagor, their father. There is nothing in section 20 of the Limitation Act to warrant the belief that the extended period of limitation is intended to operate only against the person making the payment.

The appeal is dismissed with costs.

S. C. G.

Appeal dismissed.

(1) (1905) I. L. R. 32 Calc. 1077.

(2) (1906) I. L. R. 33 Calc. 1278.

APPELLATE CRIMINAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Carnduff.

BARINDRA KUMAR GHOSE AND OTHERS

v.

EMPEROR.*

1909
Nov. 23.

Jury, right of trial by—Interference with the right—Governor-General in Council, powers of—Indian Councils Act (24 & 25 Vic., c. 67) s. 22, proviso—European British subject, rights of—Waiver—Order of Local Government authorising complaint of certain offences—Commitment on charge for other offences—Jurisdiction, want of—Local Government, powers of—Delegation of powers—Charges against members of a secret society—Misjoinder—Same transaction—Confessions, admissibility of—Confessions made during police investigation and to Magistrate subsequently holding inquiry—Examination of accused—Eliciting statements by questions—Admissions to the police—Hand writing, modes of proof of—Comparison of handwriting—Leading questions—Criminal Procedure Code (Act V of 1898) ss. 164, 196, 235, 239, 342, 364, 447, 454, 532—Evidence Act (I of 1872) ss. 21, 25, 29, 47, 67, 73—Waging war—Conspiracy to wage war—Penal Code (Act XLV of 1860) ss. 121, 121A.

The Criminal Procedure Code, in so far as it interferes with the mode of trial by Jury, is not *ultra vires* under the proviso to s. 22 of the Indian Council's Act (24 & 25 Vic., c. 67).

King-Emperor v. Kartik Chandra Dutt (1) followed. *In the matter of Ameer Khan* (2) approved of.

An European British subject can, under s. 454 of the Code, relinquish his right to be dealt with as such. Where the Magistrate explained to such a person the nature of the charges framed against him, and his rights under ss. 447 and 450, and then asked him whether he claimed to be dealt with as such, and the latter stated that he did not claim the right:—

Held, that he had relinquished his right.

In re Quiros (3), *Queen-Empress v. Grant* (4), *Queen-Empress v. Bartlett* (5) followed.

Where an order under s. 196 of the Criminal Procedure Code authorized a particular police officer to prefer a complaint of offences under ss. 121A,

* Criminal Appeals, Nos. 456, 474, 480 of 1909, against the convictions and sentences passed by C. P. Beachcroft, Additional Sessions Judge of Alipore, dated May 6, 1909.

(1) (1909) Unreported.

(3) (1880) I. L. R. 6 Calc. 83.

(2) (1870) 6 B. L. R. 392 & 459.

(4) (1888) I. L. R. 12 Bom. 561.

(5) (1892) I. L. R. 16 Mad. 308.

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122, 123 and 124 of the Penal Code, "or under any other section of the said Code which may be found applicable to the case," and the examination of the complainant also referred to the same sections :—

Held, that no complaint under s. 121 of the Penal Code was thereby authorized by the Local Government or in fact preferred, that the Magistrate had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court, authorizing a complaint under the section which was not in fact made thereafter ; nor did s. 532 of the Criminal Procedure Code apply in such a case.

Sham Khan's case (1) approved of.

Queen-Empress v. Morton (2), distinguished ; and *Queen-Empress v. Bal Gangadhar Tilak* (3) dissented from.

The Local Government cannot delegate to any other body or person the controlling power and discretion of determining whether cognizance shall be taken by the Court of an offence mentioned in s. 196 of the Criminal Procedure Code, and its judgment must be specifically directed to the particular section, and no other, under which the prosecution is to be carried on, and the order or authority should be preceded by a deliberate determination in this respect. An order authorizing a complaint under certain specified sections "*or under any other sections found applicable*," if it means found by any one other than Government, involves a delegation which cannot be sustained.

Where the accused were all alleged to have been members of a secret society, with its head-quarters in Maniktolla in the suburbs, and its places of meeting in Calcutta and elsewhere, and to have joined in the unlawful enterprise, and with others, known and unknown, to have conspired to wage war or to deprive the King of the sovereignty of British India, and to have collected arms and ammunition with such intent and to have actually waged war :—

Held, that the joint trial of the accused on charges under ss. 121, 121A, 122 and 123 of the Penal Code was not bad for misjoinder of persons or charges.

A confession under s. 164 of the Criminal Procedure Code must be made either in the course of an investigation under Chapter XIV or after it has ceased and before the commencement of the inquiry or trial. The condition requiring the confession to be prior to the commencement of the inquiry or trial is only imposed when the investigation has ceased, and not when it is made in the course of the police investigation.

Where a number of persons were arrested on the 1st May, and the confessions of some of them were recorded on the 4th and 5th, while others were brought in subsequently and their confessions taken while the police investigation was then actually going on, and on the 17th an order under s. 196 was obtained and the police report sent in, and on the next day the examination of the prosecution witnesses begun :—

Held, that the Magistrate did not take cognizance under s. 190 of the Code, nor did the inquiry commence on the 4th, and that the confessions were taken in the course of an investigation under Chapter XIV.

- (1) (1890) *Punj. R.*, Cr. J. No. 16. (2) (1884) *I. L. R.* 9 Bom. 288.
 (3) (1897) *I. L. R.* 22 Bom. 112.

The fact that the Magistrate who has taken the confessions, afterwards holds the inquiry, does not, under section 164, constitute the recording of the confessions an examination of the accused in the course of it and at its commencement.

Empress v. Anuntram Singh (1) and *Empress v. Yakub Khan* (2) declared obsolete.

Sat Narain Tewari v. Emperor (3) distinguished.

Section 164 includes confessions taken by a Magistrate who afterwards holds such inquiry or trial.

Empress v. Anuntram Singh (1) and *Reg. v. Bai Ratan* (4) declared obsolete on the point.

Sections 164, 342 and 364 of the Code are not exhaustive, and do not limit the generality of section 21 of the Evidence Act as to the relevancy of admissions.

Queen-Empress v. Narayan (5) referred to.

The mere fact that a statement was elicited by a question does not make it irrelevant as a confession under section 164 of the Criminal Procedure Code or section 29 of the Evidence Act; though such fact may be material on the question of its voluntariness.

Methods of proving handwriting discussed.

A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear.

Section 73 of the Evidence Act does not sanction the comparison of any two documents, but requires, first, that the standard writing shall be admitted or proved to be that of the person to whom it is attributed; and, secondly, that the disputed writing must *itself* purport to have been written by the same person. A comparison of handwriting is at all times, as a mode of proof, hazardous and inconclusive, and especially so when made by one not conversant with the subject and without guidance from the arguments of counsel and evidence of experts.

Phoddee Bibee v. Gobind Chunder Roy (6) referred to.

The value of expert evidence of handwriting discussed.

Reg. v. Harvey (7) referred to.

To constitute an admission, the document need not be written by the party against whom it is used: it is sufficient if it is found in his possession, and his conduct thereto creates an inference that he was aware of its contents and admitted their accuracy; but, unless this is done, the document cannot be used against him as proof of its contents. What conduct would properly give rise to such inference depends on the facts of each case. The mere fact of possession of letters is not of much value, unless it is shown that their contents were recognized and adopted by the replies elicited or the conduct inspired by them.

The expression "*wages war*" in section 121 of the Penal Code must be construed in its ordinary sense, and a conspiracy to wage war, or the collection of men, arms and ammunition for that purpose, is not waging war.

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| (1) (1880) I. L. R. 5 Calc. 954. | (4) (1873) 10 Bom. H. C. R. 166. |
| (2) (1883) I. L. R. 5 All. 253. | (5) (1893) Ratanlal Unrep. Cr. Cas. 679. |
| (3) (1905) I. L. R. 32 Calc. 1085. | (6) (1874) 22 W. R. 272. |
| (7) (1869) 11 Cox. C. C. 546. | |

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An agreement between two or more persons to do all or any of the unlawful acts mentioned in section 124A of the Penal Code is an offence, and the fact of the purpose not being immediate is only material in connection with section 95. No proof is necessary of direct meeting or combination, nor need the persons be brought into each other's presence; but the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. Nor is it necessary that all the accused should have joined in the scheme from its inception.

Eliciting answers from witnesses while under examination-in-chief or re-examination, by leading questions, deprecated.

Per CARNDUFF J. Regard being had to the definition of "proved" in section 3 of the Evidence Act, "moral conviction," provided it is based exclusively on evidence that is admissible, is not distinguishable from "legal proof."

Save when an accused person is being examined under section 342 of the Criminal Procedure Code, there is nothing to prevent a Magistrate from eliciting information from him by independent enquiry so long as the information is voluntarily given.

A statement by an accused to the police, which tells against him but does not amount to an admission of guilt, is admissible in evidence. Each case must be decided as it arises with reference to the question whether the particular statement is or is not a confession.

Queen v. Macdonald (1), *Empress v. Dabee Pershad* (2), *Queen v. Amir Khan* (3) and *Emperor v. Mahomed Ebrahim* (4), referred to.

Queen v. Hurribole Chunder Ghose (5), *Queen-Empress v. Mathews* (6), *Queen-Empress v. Meher Ali Mullick* (7) *Imperatrix v. Pandharinath* (8) and *Queen-Empress v. Javecharam* (9), discussed and distinguished.

Handwriting may, in addition to the usual methods, be proved by circumstantial evidence under section 67 of the Evidence Act, which prescribes no particular kind of proof.

Neel Kanto Pandit v. Juggobundhoo Ghose (10), *Abdool Ali v. Abdoor Rahman* (11) and *Abdulla Paru v. Gannibai* (12) referred to.

The case for the prosecution was briefly as follows. About 1904 the appellant, Barindra Kumar Ghose, who was one of the mainsprings of the alleged conspiracy, commenced preaching the doctrines of political independence throughout Bengal. He went about from district to district, for about two years, teaching the gospel of independence, and started gymnasiums for

(1) (1872) 10 B. L. R. App. 2.

(2) (1881) I. L. R. 6 Calc. 530.

(3) (1871) 9 B. L. R. 36, 72.

(4) (1903) 5 Bom. Law Rep. 312.

(5) (1876) I. L. R. 1 Calc. 207.

(6) (1884) I. L. R. 10 Calc. 1022.

(7) (1888) I. L. R. 15 Calc. 589.

(8) (1881) I. L. R. 6 Bom. 34.

(9) (1894) I. L. R. 19 Bom. 363.

(10) (1874) 12 B. L. R. App. 18.

(11) (1874) 21 W. R. 429.

(12) (1887) I. L. R. 11 Bom. 690.

physical culture and the study of politics. After a short sojourn in Baroda he returned to Bengal, convinced that a purely political propaganda would not avail, and that the people must be trained spiritually to face dangers. In 1905 came the partition of Bengal and its concomitant resultants, the *swadeshi* and boycott agitations, and Barindra determined to utilise the movement and to adapt it to his own political ends as a fresh lever to work on the minds of the people. He began a system of recruitment of a band of impressionable youths imbued with the principles of discipline and love of the mother-country, and prepared to secure their aims by any means, however violent, and even to sacrifice their lives at the paramount call of duty. He with two others started the "*Jugantar*" newspaper as a channel for the dissemination of seditious doctrines, but after a year and a half he gave it up and again took to recruiting. A secret society was formed for the overthrow of the British Government, which had its head-quarters at a garden house in 32, Muraripuker Road, Maniktolla, in the suburbs of Calcutta, jointly owned by Barindra and his brothers, Arabinda Ghose and others, and its places of meeting at various houses in the town of Calcutta and in a house called "Seal's Lodge" in Baidyanath. A revolution was to be brought about, and to that end disaffection and discontent were to be excited. False and malicious slanders were to be circulated to inflame the minds of the people against the British. Money to defray the expenses of the agitation was to be obtained by robbery, bombs and other explosives prepared, the youth of the country were to be trained in warlike exercises, and every preparation made to effectuate the revolution by force of arms. Missionaries were sent out to sow revolutionary ideas broadcast among the people, and the aid of certain newspapers secured to educate the masses in the same cult. The "*Chhatra Bhandar*," originally started in 1904 as a purely commercial concern, was gained over, and ultimately, in the guise of a general trading company, it devoted itself chiefly to the circulation of seditious literature, assisted by various secret agencies in different parts of the country. The conspirators

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collected large quantities of arms, ammunition and explosives, and materials or accessories connected with their manufacture, and stored them in the Maniktolla garden house.

In October 1907, the Criminal Investigation Department first discovered the existence of this society and its workings. Nothing further was, however, ascertained till December, when investigations were made in consequence of the abortive attempt to wreck the Lieutenant-Governor's train at Naraingarh on the Bengal-Nagpur Railway. The task of shadowing the conspirators systematically was taken up, and a close observation by special detective police officers and spies kept on their movements, particularly at the garden house, at their places of rendezvous in the town of Calcutta, and at the offices of the "*Navasakti*" newspaper. The vigilance of the police was redoubled after the bomb outrage, on 11th March 1908, in the house of the Mayor of Chandernagore, who had shortly before prohibited political meetings in the town, and when warning was received on the 20th April of designs against the life of Mr. Kingsford, the Sessions Judge of Mozufferpore, who had incurred the hatred of the conspirators by his sentences on certain offenders while he was the Chief Presidency Magistrate of Calcutta.

On the 30th April occurred the assassination of Mrs. and Miss Kennedy at Mozufferpore by a bomb, and it precipitated the action of the police. Accordingly, in the early morning of the 2nd May, armed with search warrants, they entered the garden and the suspected houses in town, arrested the inmates and took possession of all the documents, including cyclostyle copies of a book on explosives, and the other articles, bombs and materials used for explosives, together with a quantity of arms and ammunition, found on the several premises searched. Fourteen accused persons, including the seven appellants, were arrested at 32 Muraripukur Road, and others at 38-4 Raja Nava Kissen's Street, 15 Gopi Mohun Dutt's Lane, and at 48 Grey Street in Calcutta. Search lists were prepared partly on the spot and partly at the thana.

On the 3rd May Mr. Birley, the officiating District Magistrate of the 24-Parganas, withdrew the case of the accused arrested

at 32 Muraripukur Road from the cognizance of the Deputy Magistrate of Sealdah to his own Court under section 528 of the Criminal Procedure Code. On the next day 14 persons were put up before him, and he, after recording the confessions of Barindra Kumar Ghose, Ullaskar Dutt, Upendra Nath Banerjee, Indu Bhusan Roy and Bibhuti Bhusan Sircar, remanded them to jail till the 18th May for the completion of the investigation. On the next day the confessions of one of the 14, and of Norendra Nath Gossami who was brought in, were taken, and the accused remanded to jail till the same date. Seven new accused were then placed before him and similarly sent to jail. On the 6th and 7th, certain of the accused were remanded to police custody for 24 hours for the purposes of the investigations then going on. Between the 11th and the 16th several other accused were produced before the Magistrate under arrest, and remanded till the same date after their statements had been recorded. The accused who had been arrested in Calcutta and placed before a Presidency Magistrate, were also in the meantime put up before Mr. Birley and remanded.

On the 17th May Purna Chandra Biswas, Inspector of Police in the Criminal Investigation Department, submitted a First Information report to Mr. Birley, giving a short history of the discovery of the existence of the secret society, the police measures taken, and mentioning the places of meetings of the conspirators, the searches and arrest of the accused at these and other places on receipt of the news of the Mozufferpore outrage, the names of the accused and the facts ascertained by the confessions of some of them, and concluded as follows:—
“In consideration of the facts already discovered, I submit this First Information report, charging the members of this secret society under sections 143, 145, 150, 157, 121, 121A, 122, 123 and 124, Indian Penal Code.” Attached to the report was a list of the accused. On the same day sanction was granted by the Government of Bengal in terms set forth in the judgment of the learned Chief Justice.

The preliminary inquiry against the accused commenced before Mr. Birley on the 18th May, and one prosecution witness

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was partly examined-in-chief. On objection taken that the complainant had not been first examined, the Magistrate, on the next day, noted at the foot of the list of accused attached to the First Information the following :—"This is treated as a petition of complaint, and the petitioner is orally examined on solemn affirmation." Purna Chandra Biswas was examined and deposed in the following terms :—

Sanction has been given to me by the Government of Bengal (tendered and marked Ex. 1) to prosecute certain persons under ss. 121A, 122, 123 and 124, I. P. C. I complained against [33 accused named]. These people are all accused of organizing a gang for the purpose of waging war against the Government and overawing the Government by means of criminal force.

The witness who had been examined in part was then re-examined *de novo*. On the 20th May Sushil Chunder Sen was arrested and two others, Hem Chunder and Barendra Kumar Sen. On the next two days 12 prosecution witnesses were examined by Mr. Birley, and the case adjourned to the 6th June, under section 344 of the Code, as it appeared likely that further evidence might be obtained by the remand. On the 23rd May sanction in identical terms as in the former one was granted by the Local Government in respect of the new accused, and a complaint made before the Joint Magistrate against them on the 3rd June, which was withdrawn by Mr. Birley to his own file on the 6th. The complainant and all the prosecution witnesses were examined afresh, and the inquiry proceeded. The accused now before the Magistrate constituted the first batch.

On the 13th August Mr. Birley asked Barindra Kumar Ghose whether he claimed the certificate, alleging his birth at Croydon, England, produced as being his. On the answer being in the affirmative, he next asked him, under section 454 of the Criminal Procedure Code, whether he claimed to be dealt with as a European British subject, explaining sections 447 and 450, but giving him time till the 15th to consider the matter.

On the 19th August the Magistrate recorded the following note in the order-sheet :—

I have informed Barindra Kumar Ghose that he will be tried for abetment of murder, and explained that, if he claims his rights as a European British subject, he will be tried by the High Court, and if not, he will be tried by the Sessions Court. He says he does not claim the right,

He then committed Barindra to the Sessions Court for abetment of murder, and the others under sections 121, 121A and 123, declining the application of the prosecution to commit the former also under the same sections. Barindra then obtained an order from the High Court directing his discharge, or commitment with the other accused on the same charges. Accordingly, on the 2nd September, Mr. Birley committed him, recording the following order :—

The High Court have ordered me either to discharge Barindra Kumar Ghose or commit him under ss. 121, 121A and 123, I. P. C. I have informed him that I am going to charge him under ss. 121, 121A and 123, I. P. C., and asked him whether he intends to claim his rights as a European British subject. He says that he does not wish to claim his rights. Accordingly he is charged under ss. 121, 121A and 123, I. P. C., and committed for trial.

In the mean time, on the 10th June, Debabrata Bose was brought in and remanded to jail by Mr. Birley till the 25th, on the statement of the Police Inspector that there was evidence of accomplices with correspondence raising a suspicion of his membership with the secret society. On the 22nd several other accused were produced and remanded by the Magistrate to the 8th July. On the 25th he took cognizance against Debabrata under sections 121, 121A, 122 and 123 of the Indian Penal Code, authority to prosecute him having been received previously from the Local Government. He was then remanded till the 8th July, as also the prisoners brought in between these dates. On the 9th July a complaint under authority of the Local Government was made by Purna Chunder Biswas, and the Magistrate took cognizance against those who had been brought in since the 22nd June. He adjourned the case to the 21st July, and again to the 5th August, on which date a fresh complaint was filed under authority against those brought in after the 9th July. The inquiry was postponed to the 24th August, when a complaint with authority was made against all the accused under section 121, Indian Penal Code, in addition to the sections mentioned in the previous complaints and orders of the Local Government, and the Magistrate took cognizance thereon and proceeded with the inquiry. This was the second batch of accused. All but two were finally committed on the same charges as the first batch.

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On the 19th October the trial of the two batches of prisoners, numbering 37, came on before Mr. Beachcroft, the Additional Sessions Judge of Alipore, with the aid of two assessors. Various legal objections were taken to the proceedings before the committing officer by the defence, including the want of a complaint under authority under section 121 of the Indian Penal Code.

Mr. Eardley Norton, who appeared for the prosecution, informed the Judge that he would file a fresh order of the Local Government with respect to that offence, though he did not admit that the original order was insufficient. He subsequently produced an undated order, signed by Mr. F. W. Duke, Chief Secretary to the Government of Bengal, in terms of that of the 17th May, adding section 121 of the Indian Penal Code to the sections mentioned in the earlier authority. The charges were remodelled with slight alterations on the 12th February 1909, and stood as follows :—

1st. That you (named), on or about the 12 months preceding the 15th May 1908, at various places in Bengal, including 32 Muraripukur Road, Maniktolla, waged war against the King-Emperor and thereby committed an offence under s. 121, I. P. C., within my cognizance.

2nd. That you... Maniktolla (*repeating the words of the first head of charge*) attempted to wage war against the King-Emperor, and thereby committed an offence under s. 121, I. P. C.

3rd. That you... Maniktolla (*as in the first head*) abetted one another and other persons in waging war against the King-Emperor, and thereby committed an offence under s. 121, I. P. C.

4th. That you... Maniktolla (*as in the first head*) conspired amongst yourselves and with other persons to commit all or any offence under s. 121, I. P. C., as set forth above, and thereby committed an offence under s. 121A, I. P. C.

5th. That you... Maniktolla (*as in the first head*) conspired amongst yourselves and with other persons to deprive the King-Emperor of the sovereignty of British India or part thereof, and thereby committed an offence under s. 121A, I. P. C.

6th. That you... Maniktolla (*as in the first head*) conspired amongst yourselves and with other persons to overawe by criminal force the Government of India or the Local Government of Bengal, and thereby committed an offence under s. 121A, I. P. C.

7th. That you... Maniktolla (*as in the first head*) collected men and arms or ammunition or otherwise prepared to wage war with the intention of either waging or being prepared to wage war against the King-Emperor, and thereby committed an offence under s. 122, I. P. C.

8th. That you... Maniktolla (*as in the first head*) concealed by illegal omission the existence of a design to wage war against the King Emperor

intending by such concealment to facilitate, or knowing it to be likely that such concealment would facilitate, the waging of such war, and thereby committed an offence under s. 123, I. P. C.

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The confessions of the prisoners were recorded by Mr. Birley and purported to have been taken under section 164 of the Criminal Procedure Code. They were recorded in the form of question and answer, except the statement of Bibhuti, in which the questions were omitted. Before taking down the statements, the Magistrate first asked each prisoner if he wished to make a statement, and then cautioned him that his statement was being made before a Magistrate and would be admissible in evidence against him. He next asked most of the accused if their statements "*were made voluntarily, or had any pressure been put*" on them to make them. He varied this form of the question, in some instances, by asking the accused "*has any one compelled you to say anything,*" or "*have the police ill-treated you in order to get you to make a statement,*" or "*has any one taught you to say anything by force,*" or "*have the police oppressed you in any way.*" The next question he put the accused was "what have you to say" or "what is your history," or, in the case of accused who said they had already stated what they wished in a written statement, "have you any objection to making that statement to me here." Then followed the confessional statements of the accused. During the making of the statements the Magistrate interposed and put supplementary questions to the prisoners about matters or persons already mentioned by them, or to elicit fresh information regarding the details of the conspiracy, its operations and the connection of other persons therewith. The memorandum required by section 164 was duly attached to the record of each confession and the necessary signatures affixed. At the foot of the record of the first confession, viz., that of Barindra, the Magistrate appended a note that "*the statement was recorded between 3 and 5 p.m. Accused was guarded by two constables of the Bengal Police, and not by the Calcutta Police constables who brought him. No other police officer was present in Court.*"

Two of the accused, Sudhir Kumar Sirkar and Krishna Jiban Sanyal, retracted their confessions before the Committing

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Magistrate, alleging police pressure, but the others resiled only at the commencement of the Sessions trial and without assigning any reasons.

One of the appellants, Barendra Chunder Sen, was arrested on suspicion at his father's house in Sylhet. During the search of the premises by Mr. Kemp, Deputy Superintendent of Police, under the authority of two warrants issued under the Arms Act and the Explosives Act, he found a canvas bag containing a packet of powder which he took out and placed on the ground. Barendra picked it up hurriedly, whereupon Mr. Kemp snatched it away and asked what it was. The prisoner correctly named the ingredients of the powder, and, according to one police witness, said "*he had made it,*" adding "*it is not an explosive yet;*" and according to another he explained that "*it was a kind of powder made by himself, and that he had been preparing it as an experiment to see whether it acted as an explosive or not.*" The powder was on examination found to contain sulphide of lead, an unusual ingredient which was also discovered in the powders used by the conspirators at the Harrison Road house and in the Chandernagore bomb. There were in the bag also one, if not two, of the note-books seized by Mr. Kemp, and the accused admitted that *both had been written by him*. These note-books contained a formula for making bombs, copied from a book found at the head-quarters of the conspiracy, and also detailed notes regarding the qualities, uses, and the composition of high explosives and blasting agents taken *verbatim* from the "Hand-book of Modern Explosives" by Eissler, a copy of which was disinterred from an iron tank buried in the garden house. The packet of powder and the note-books were mainly relied on by the prosecution as proving his connection with the conspiracy. It also appeared that a letter purporting to be signed by "Sri Barendra Chandra Sen" intended for Arabinda Ghose, dated the 26th April 1908, was found in the Maniktolla garden, and a postal receipt for a money order for Rs. 8, sent by "Barendra Chandra Sen" on the 28th to Arabinda, with an acknowledgment for the same, was discovered by Mr. Kemp during the Sylhet search, and Barendra, on being questioned by him, explained that "*when*

coming from Calcutta he had borrowed Rs. 8 from Barindra, the brother of Arabinda," and that "on his return home to Sylhet his people had remitted the 8 rupees by money order to Barindra." This statement showed that the prisoner was in touch with Barindra, the leader of the conspiracy.

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The findings of the Assessors and the Sessions Judge, and the sentences passed on the accused, are set out in the judgment of the learned Chief Justice.

Mr. C. R. Das, Mr. R. C. Bonnerjee, Babu Narendra Kumar Bose, Babu Sarat Chunder Sen, Babu Narendra Nath Sett and Babu Satish Chunder Mookerjee, for Barindra Kumar Ghose and Ullaskar Dutt.

Babu Sarat Chunder Sen, Babu Mahini Mohan Chatterjee, Babu Narendra Nath Sen and Babu Ramesh Chunder Sen, for Upendra Nath Banerjee and others.

Mr. Chakravarti, Mr. B. K. Lahiri, Babu Dasharathi Sanyal, Babu Manmatha Mookerjee and Babu Debendra Narain Bhattacharjee, for Indra Nath Nundy.

Mr. Eardley Norton, Mr. Stokes, Babu Atulya Charan Bose and Babu Birbhusan Dutt, for the Crown.

Cur. adv. vult.

JENKINS C.J. The appellant, Ashok Chandra Nandy, having died since the institution of these appeals, there are at present before the Court 18 appellants, all of whom have been convicted under Chapter VI of the Indian Penal Code of offences against the State. Two of the appellants, Barindra Kumar Ghose and Ullaskar Dutt, were convicted under sections 121, 121A and 122 of the Indian Penal Code and sentenced to death; eight of them, *i.e.*, Indra Nath Nandi, Upendra Nath Banerjee, Bibhuti Bhusan Sircar, Hrishikesh Kanjilal, Sudhir Kumar Sircar, Sailendra Nath Bose, Hem Chandra Das and Barendra Chandra Sen, were convicted under sections 121, 121A, 122 of the Indian Penal Code, and sentenced to transportation for life; Abinash Chandra Bhattacharjee was convicted under sections 121 and 121A of the Indian Penal Code, and sentenced to transportation for life: Indu Bhushan Roy

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was convicted under sections 121A and 122 and sentenced to transportation for life ; Pares Chandra Maulik, Sisir Kumar Ghose and Nirapada Roy were convicted under sections 121A and 122 of the Indian Penal Code and sentenced to transportation for ten years ; Sushil Kumar Sen and Bal Krishna Hari Kane were convicted under section 121A of the Indian Penal Code and sentenced to seven years' transportation, and Krishna Jiban Sanyal was convicted under section 121A of the Indian Penal Code and sentenced to one year's rigorous imprisonment. On all, except the last three, the additional penalty has been imposed of forfeiture of their property. The appellants were so convicted and sentenced by the Additional Sessions Judge of Alipore, who heard the case with Assessors. Both the Assessors considered the appellants, Barindra Kumar Ghose, Ullaskar Dutt, Upendra Nath Banerjee, Bibhuti Bhushan Sircar, Hrishikesh Kanjilal, Hem Chandra Das and Indu Bhushan Roy guilty of an offence under section 122 of the Indian Penal Code, and to one of them it appeared that another of the appellants, Pares Chandra Maulik, was guilty under the same section. But in no other case did either Assessor deem the guilt of the accused to be established on any of the charges preferred against them, though one of them considered Abinash guilty under section 124A.

The Prosecution story may be briefly stated. According to it, the appellant, Barindra Kumar Ghose, has throughout been the master mind ; he conceived the scheme, he designed the means, and he inspired the work. As far back as 1903 or 1904 he began what he believed to be his mission of preaching throughout Bengal the independence of India. Then he returned for a while to Baroda, where his brother, Arabinda Ghose, was a Professor in the Gaekwar's College. In 1905 came the partition of Bengal, which, according to the case for the Crown, was "unquestionably a landmark in this attempted revolution," and was used in its promotion. This is how it has been described by the learned counsel for the Crown in its bearing on the present case. "Those who used this engine

regarded it from this point of view—that it was a line of demarcation between a population who were the same in kindred, faith, colour, caste, creed and sympathies. They said an unnecessary line of demarcation had been drawn, and that the effect of it had been to sever people who had a common point of view.” Then, after a reference to the “*Jugantar*” newspaper which has played a large part, it is said, in preparing the minds of the youth of Bengal to receive the insidious doctrines of rebellion, he proceeded :—“ The partition would, therefore, lend an additional tone to their invectives in this paper, and from that point of view they could understand why it was that the 16th October had always been regarded as a day of humiliation and prayer. Those who used it had recognised the full value of the partition as a fresh lever to work on the minds of the people.” And so, according to the theory of the Crown, the partition induced a state of mind in the young men of Bengal ready to receive the doctrines of independence which the *Jugantar* incessantly preached. Then, it is said, Barin, who had thus dexterously utilized the opportunities that came in his way, began a scheme of recruitment, whereby he sought to attract to himself and his purposes a band of youths inspired with deep religious fervour, and indoctrinated with the principles of absolute discipline, self-negation and intense love of the mother country, which would lead them willingly to lay down their lives at what they were taught to regard as a paramount call of duty. Ultimately, the prosecution case is, a society was created on these lines, having for its aim the overthrow of the present form of Government, and ready to effect its purpose even by waging war against the King. This society, it is said, had its head-quarters at No. 32, Muraripukur Road in the suburbs of Calcutta, to which I will hereafter refer as the Garden, and it also had, what have been termed, “ places of conspiracy ” in various parts of Calcutta, and at a remote country house in the neighbourhood of Baidyanath called Seal’s Lodge.

We are asked to hold that the appellants were all members of this society, and joined in this unlawful enterprise ; that

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they collected arms and ammunition with the intention of waging war against the King ; that they with others, known and unknown, conspired to wage war against the King or to deprive him of the sovereignty of British India ; and, finally, that they actually waged war against the King.

The period covered by the charge is described therein as "on or about twelve months preceding the 15th of May 1908," and the scene of the offences charged is laid at "various places in Bengal including 32, Muraripukur Road."

It is said that the police came to hear of the society and its workings first in October 1907, and then in January 1908. In the month of March 1908 the work of watching the members of the society began, and thereafter a close observation was kept on their movements between various places, and in particular the Garden, 15, Gopi Mohun Dutt's Lane, 134, Harrison Road, 4, Harrison Road, 23, Scott's Lane, 38-4, Raja Nava Krishna Street, and 48, Grey Street, all of which, except the Garden, are in the town of Calcutta. The action of the police was precipitated by the murder, on the 30th of April 1908, at Mozufferpore, of two ladies, Mrs. and Miss Kennedy, by the throwing of a bomb, the culprits being Khudiram Bose and Profulla Chaki, of whom the first has paid the extreme penalty of the law, while the other escaped punishment by committing suicide as he was on the point of arrest. This shocking outrage rendered delay no longer possible, and after a conference of leading officers, the police, in the early morning of the 2nd of May, armed with search warrants, entered the Garden and the several places of conspiracy in Calcutta, arrested the inmates, and took possession of the documents and articles they found.

Of the appellants, Barindra Kumar Ghose, Indu Bhushan Roy, Ullaskar Dutt, Upendra Nath Banerjee, Sisir Kumar Ghose, Pares Chandra Maulik and Bibhuti Bhusan Sircar were arrested at the Garden ; Hem Chandra Das at 38-4, Raja Nava Kissen Street ; Nirapado Roy at 15, Gopi Mohan Dutt's Lane ; and Abinash Chandra Bhattacharjee and Shailendra Nath Bose at 48, Grey Street.

The remaining seven appellants were subsequently arrested, Sudhir Kumar Sircar on the 10th of May at Khulna, Hrishikesh Kanjilal on the 10th of May at Chatra, Barendra Chandra Sen and Sushil Kumar Sen on the 15th of May at Baniachang in Sylhet, Krishna Jiban Sanyal on the 16th of May at Kansat, Indra Nath Nandi on the 23rd of June at 37, College Street, Calcutta, and Bal Krishna Hari Kane on the 20th of July at Nagpur. On the 4th of May Barin, Indu Bhushan Roy, Ullaskar Dutt, Upendra Nath Banerjee and Bibhuti Bhusan Sircar made confessions to Mr. Birley, the District Magistrate of the 24-Parganas; on the 11th of May Sudhir Kumar Sircar, and on the 16th of May Krishna Jiban Sanyal, made statements to him. Mr. Birley purported to record all these under section 164 of the Criminal Procedure Code.

In support of the appeals before us the appellants have urged that the convictions are bad in law, and further that they are not justified by the evidence on the record. In a case so voluminous innumerable arguments would naturally arise on one side and the other, and though many from their transient character must pass unnoticed in this judgment, all have been carefully considered and weighed. First, then, I will deal with the several legal objections that have been advanced against the convictions now under appeal.

I need not discuss at length the contention that the right to trial by jury could not be taken away by the Criminal Procedure Code. The argument rests on the proviso to section 22 of the Indian Councils Act, 1861, whereby it is declared that the Governor-General in Council shall not have the power of making any law which may affect any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom.

But the point has been determined adversely to Mr. Das' contention in a recent decision of this Court by which we are bound; therefore, we must overrule this objection.

The next objection taken is that Barin being a European British subject the Magistrate was bound to commit him to

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the High Court in accordance with the provisions of section 447 of the Criminal Procedure Code, and that the rest of the accused should have been similarly committed in compliance with section 452.

Criminal proceedings against European British subjects are regulated by Chapter XXXIII of the Criminal Procedure Code, and provision is made in that Chapter for the tribunal before which a person answering that description can be tried and as to the sentence that may be passed. It is conceded by the Crown that it became apparent on the face of the proceedings in the course of the inquiry before the Committing Magistrate that Barindra Kumar Ghose was a European British subject, but it has been held that he waived his right to be treated as such. This, it is contended by Mr. Das, is erroneous.

Section 447 provides that : “ (i) When an European British subject is accused of an offence before a Magistrate, and such offence cannot, in the opinion of such Magistrate, be adequately punished by him, and is not punishable with death or with transportation for life, such Magistrate shall, if he thinks that the accused ought to be committed, commit him to the Court of Session, or, in the case of a Presidency Magistrate, to the High Court.”

(ii) “ When the offence which appears to have been committed is punishable with death or with transportation for life, the commitment shall be to the High Court.”

Section 449 (i) is in these terms : “ Notwithstanding anything contained in section 31, no Court of Session shall pass on any European British subject any sentence other than a sentence of imprisonment for a term which may extend to one year, or fine, or both.”

Section 452 enacts that : “ In any case in which an European British subject is accused jointly with a person not being an European British subject, and such European British subject is committed for trial before a High Court or Court of Session, such subject and person may be tried together, and the procedure on the trial shall be the same as it would

have been had the European British subject been tried separately :

“Provided that, if the European British subject requires under section 450 to be tried by a mixed jury, or by a mixed set of assessors, and the person not being an European British subject requires that he shall be tried separately, the latter person shall be tried separately in accordance with the provision of Chapter XXIII.”

But then it is provided by section 453 that : (i) “When any person claims to be dealt with as an European British subject, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial ; and such Magistrate shall inquire into the truth of such statement, and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject, and shall deal with him accordingly. If any such person is convicted by such Magistrate and appeals from such conviction, the burden of proving that the Magistrate’s said decision was wrong shall lie upon him.”

(ii) “When any such person is committed by the Magistrate for trial before the Court of Session, and such person before such Court claims to be dealt with as an European British subject, such Court shall, after such further enquiry, if any, as it thinks fit, decide whether he is or is not an European British subject, and shall deal with him accordingly. If he is convicted by such Court and appeals from such conviction, the burden of proving that the Court’s said decision was wrong shall lie upon him.”

(iii) “When the Court, before which any person is tried, decides that he is not an European British subject, such decision shall form a ground of appeal from the sentence or order passed in such trial.”

While under section 454 (i), “If an European British subject does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before, and disallowed by,

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the committing Magistrate, it is not again made before the Court to which such subject is committed, he shall be held to have relinquished his right to be dealt with as such European British subject and shall not assert it in any subsequent stage of the same case."

(ii) "Unless the Magistrate has reason to believe that any person brought before him is not an European British subject, the Magistrate shall ask such person whether he is such a subject or not."

On the strength of these sections, it is contended (i) that Barindra Kumar Ghose could only be committed to the High Court, (ii) that his co-accused too could only have been so committed, (iii) that there could be no waiver of a want of jurisdiction apparent on the face of the proceedings, (iv) that sections 453 and 454 could have no application where, as here, the status of European British subject is manifest and not open to doubt, (v) that there has been no waiver by Barindra, (vi) that if there was a waiver in fact, then it was not after he was made fully acquainted with all that he was giving up, and (vii) that in any case there was no waiver by his co-accused.

Though I recognise the force of Mr. Das' arguments, I hold that on the first four points we are concluded by the decision of a Bench of this Court in *In the matter of Quiros* (1), and I do not think what was then said can be regarded as mere *obiter dictum*. What is *obiter dictum* is sometimes difficult to decide, but a valuable guide to the solution of this difficulty is furnished by Lord Halsbury L. C. in *Watt v. Assets Co.* (2), at page 330, where he said—"When a learned Judge is giving his views why this or that does not come within the meaning of the law which makes a thing inoperative, and when he distinguishes the case before him by pointing out there was no fraud, and, therefore, the fraud imputed did not exist, I very much doubt whether that is one of those things which can be described as a mere *obiter dictum*. It is part of the law which is guiding his judgment and part of the law he is bound

(1) (1880) I. L. R. 6 Calc. 83.

(2) [1905] A. C. 317, 330.

to expound in the judgment he is pronouncing." In the light of these remarks, I am of opinion that what was said in the course of the judgment in *In the matter of Quiros* (1) is more than mere *obiter dictum* : it was an exposition of the law necessary for the judgment then pronounced. Moreover, what was then said has been repeatedly adopted as the basis of subsequent decisions ; and we further find that since the judgment in *In the matter of Quiros* (1) the language on which it was based has been repeated in the Criminal Procedure Codes of 1882 and 1898, and this is a legislative recognition which we cannot disregard. In the light of this decision, I am of opinion that Barin could relinquish his right to be dealt with as a European British subject, and on the facts I hold that he actually did relinquish this right. From this it follows that the plea is of no avail either to Barin or his co-accused, and that the Court of Session had complete jurisdiction to dispose of the case.

It is next argued that there was no jurisdiction to take cognizance of the several offences of which the accused have been found guilty, that is to say, of offences under sections 121, 121A and 122 of the Indian Penal Code.

It is provided by section 196 of the Code of Criminal Procedure that no Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code unless upon complaint made by order of, or under authority from, the Governor General in Council, the Local Government, or by some officer empowered by the Governor General in Council in this behalf. The authority in this case has proceeded from the Local Government. This objection has been taken on behalf of the appellants belonging to what has been called the first batch, against whom a complaint was preferred under the order or authority of the Local Government on the 17th of May 1908 (Exhibit 1). It is in these terms—"Whereas it has been made to appear to His Honour the Lieutenant-Governor of Bengal that there is reason to believe that during a period commencing from about the 16th October 1905 to date

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at Maniktollah (32, Muraripukur Road), Calcutta, and other places, the following persons have committed offences punishable under sections 121A, 122, 123 and 124 of the Indian Penal Code, Babu Purna Chunder Biswas, Inspector of Police, Criminal Investigation Department, Bengal, is hereby ordered and authorised by His Honour the Lieutenant-Governor of Bengal, under the provisions of section 196 of the Code of Criminal Procedure, to prefer complaint against and to prosecute these persons, namely " : [then after setting out a list of names in which are included the names of the appellants in the first batch, the document proceeds] " for the said offences under sections 121A, 122, 123, 124 of the Indian Penal Code, or under any other section of the said Code, which may be found to be applicable to the case.

By order of

His Honour the Lieut.-Govr. of Bengal,

E. A. Gait,

17th May 1908.

Chief Secy. to the Govt. of Bengal."

* On the 19th of May a complaint was preferred in the form of an allegation made in writing to Mr. Birley, and after naming (amongst others) the appellants in the first batch, the complainant Purna Chunder Biswas submitted his complaint "charging the members of the Secret Society under sections 143, 145, 150, 157, 121, 121A, 122, 123 and 124, of the Indian Penal Code." On the same day Inspector Purna Chunder Biswas was examined on solemn affirmation on his complaint, and stated that sanction had been given to him by the Government of Bengal to prosecute certain persons under sections 121A, 122, 123, 124 of the Indian Penal Code. Then, after alleging that he complained against the 33 persons named in the Local Government's order and describing their several arrests, he proceeded in these terms :—"These persons are all accused of organising a gang for the purpose of waging war against the Government and overawing the Government by means of criminal force."

On the strength of this authority or order and complaint the Magistrate, after he had completed his enquiry, committed

these appellants for trial to the Court of Session for offences under sections 121, 121A and 123 of the Indian Penal Code.

In the Court of Session objection was taken on behalf of the accused to the charge under section 121 of the Indian Penal Code, and thereupon Counsel for the prosecution informed the Court that he would file a fresh sanction, as he called it, in respect of that section, though he did not admit that the original sanction was insufficient. He subsequently produced what was described as a sanction given by the Local Government under section 196 of the Criminal Procedure Code, and in compliance with his application the Court framed charges under sections 121 and 122 of the Indian Penal Code. The sanction here referred to was an order and authority in the terms of that of the 17th of May, which I have already cited, save that it mentioned section 121 of the Indian Penal Code in addition to the other sections set forth in the earlier authority. It was filed on the 19th of October 1908.

Two points thus arise : *first*, was a complaint under section 121 of the Indian Penal Code authorised by the Local Government ; and, *secondly*, was a complaint in fact preferred under that section ?

Section 196 of the Criminal Procedure Code reserves to the Local Government the power of determining whether cognizance shall be taken by the Court of any offence punishable under Chapter VI of the Indian Penal Code except section 127. Seeing that this Chapter deals with offences against the State, the policy of this safeguard is manifest ; the maintenance of this control is of the highest importance ; and it is beyond the competence of the Local Government to delegate to any other body or person this controlling power and the discretion it implies. The question whether actions should be taken under Chapter VI is more than a matter of law ; considerations of policy arise, and these can only be determined by the authorities specially designated in the section.

It further appears to me to be the true implication of section 196 that the judgment of the Local Government should be specifically directed to the particular sections of Chapter VI

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in respect of which proceedings are to be taken, and that the order or authority should be preceded by, and be the result of, a deliberate determination that proceedings should be taken in respect of a particular section or particular sections of the Chapter and no other.

It would, I think, be opposed to the true intendment of section 196 for the Local Government by its order to give its legal or other advisers a roving power to determine under what sections of the Chapter proceedings should be taken, and to abandon to them the discretion and responsibility that properly belong to itself; and I should hesitate to take a view of this section that might permit the Government to entrust to the zeal of an advocate, or of those by whom he may be instructed, the determination of the serious questions involved.

To turn from these general observations to the language of the order of the Local Government, can it be fairly said that it permits a complaint of an offence under section 121 of the Indian Penal Code?

This order was passed on the 17th of May, and at that time some of the most prominent of the persons arrested had made their confessions; and though the Local Government had not before it all the evidence that was afterwards adduced, it must have been aware of the facts on which reliance is now placed as constituting an offence under section 121. And yet the order does not specify that section. It recites that it had been made to appear to His Honour the Lieutenant-Governor of Bengal that there was reason to believe that the appellants (among others) had committed offences punishable under sections 121A, 122, 123 and 124 of the Indian Penal Code. It had not been made to appear that there was reason to believe that they had committed offences under section 121. Then, again, the order does not mention section 121, but only those specified in the recital. Can it in these circumstances be reasonably contended that on a true reading of this order it was intended to cover section 121 of the Indian Penal Code? I think not. It is not as though this section had been overlooked, for it is the leading section of the Chapter and is

concerned with the most serious offence of all. I cannot read the recital to the order without coming to the conclusion that it had not been made to appear to His Honour the Lieutenant-Governor of Bengal that there was reason to believe an offence had been committed under that section, nor can I suppose that this view was not the result of careful deliberation.

In the face of these facts, I decline to impute to the Local Government the sense of irresponsibility which is involved in the argument advanced by counsel that an authority was intended to be given in respect of an offence under section 121 which, in the view of that Government, there was no reason to believe had been committed. It is true that the order winds up with the words "or under any other section of the said Code which may be found to be applicable to the case." But found by whom? The order does not explain. It can hardly mean by the Court, as it relates to the complaint; and if it means found by anyone other than the Government, then it involves a delegation which cannot be sustained.

It is to be noticed for what it is worth that, in later documents, the Local Government expressly mentioned section 121, and that in his sworn statement which followed on the Local Government's order, it is distinctly said by the complainant that sanction had been given to the complainant by the Government of Bengal "to prosecute certain persons under sections 121A, 122, 123, 124, Indian Penal Code," and no suggestion is made of an authority to prosecute under section 121. Moreover, Mr. Norton, after his argument came to the notice of the Local Government, informed us that he was instructed to state that the Local Government did not desire him to argue that it was its intention to include section 121 of the Indian Penal Code in their order of the 17th of May. For the foregoing reasons I hold that the order of the 17th of May did not authorise a complaint under section 121 of the Indian Penal Code.

But then it has been argued by Mr. Norton that any defect in the procedure of the Magistrate's Court has been cured by a sanction obtained from the Local Government while the case

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was before the Court of Session. But under section 196 the only order or authority within the competence of the Local Government is one that permits a complaint; the order actually passed was that there should be a complaint; and in fact it appears that no complaint was made. It is clear, therefore, that the so-called sanction on which Mr. Norton relied before the Court of Session, and has again relied here, is absolutely valueless.

Finally, it is contended that any defect in the commitment was cured by section 532 of the Criminal Procedure Code, and as authority for this, reference has been made to *Queen-Empress v. Morton* (1), *Queen-Empress v. Bal Gangadhar Tilak* (2). The decision of *Queen-Empress v. Morton* (1) turned on a consideration of sections 197 and 532, and to appreciate what was actually determined, regard must be had to the terms of the first of these sections, which differs materially from section 196. Section 197 makes the power of cognizance dependent on sanction, and the defect in *Queen-Empress v. Morton* (1) was that there was no sanction for the magisterial enquiry, so that, in committing the accused to the High Court, the Magistrate purported "to exercise powers duly conferred which were not so conferred." The High Court, however, had (apart from this defect) power to take cognizance of the offence, as before the trial the necessary sanction had been obtained.

Here, however, there has been a want of jurisdiction not only in the Magistrate, but also in the Court of Session, for at no stage have the conditions of section 196 been satisfied. It is true that in *Queen-Empress v. Bal Gangadhar Tilak* (2), a learned Judge holding the High Court Sessions in Bombay expressed an opinion that the decision in *Queen-Empress v. Morton* (1) was binding on him, though he was then concerned with a case to which section 196 was applicable. But it is to be noticed that this was the decision of a single Judge given in the course of argument and without adverting to the fundamental distinction between the two sections. To

(1) (1884) I. L. R. 9 Bom. 288.

(2) (1897) I. L. R. 22 Bom. 112.

borrow the language of Sir Barnes Peacock in *Queen-Empress v. Nobodeep Chunder Gossamee* (1), the decision in *Queen-Empress v. Bal Gangadhar Tilak* (2) was "in the nature of a *nisi prius* decision, by which Courts sitting in Banco do not consider themselves bound." Moreover, a different view has been taken of the position by a bench of the Punjab Chief Court in *Sham Khan's case* (3). The result then is that the Court of Session had no jurisdiction to convict the appellants in the first batch under section 121. But I think it right to add that this conviction does not fail merely on the lack of jurisdiction, for on the merits too I should have held that no offence under that section has been proved.

In respect of the offences under sections 121A and 122 of the Indian Penal Code, I hold there was a good and sufficient authority under section 196 of the Criminal Procedure Code, and an earlier decision of a Bench of this Court furnishes an answer to the objection to the sufficiency of the signature of the Chief Secretary on the document containing the authority: *Apurba Krishna Bose v. Emperor* (4).

Though it was at the outset objected that the charges were bad for multifariousness, in the end this was not pressed, and I think rightly; for, though the charges as ultimately framed are not happily expressed, I think on a fair reading of them they merely purport to place before the Court different aspects of the same transaction. And I further think we should be applying to the charges, as ultimately framed, too strict a reading and too limited a meaning, if we were to give effect to Mr. Das' argument that the fourth head is limited to a conspiracy to wage a war which, according to the first head, had been already waged, or if we were to limit the fifth head by reference to the language of the fourth.

As in the view I take, the charge under section 121 cannot be sustained. Mr. Das' objection that he was not allowed to cross-examine the witnesses on the charges as re-framed falls to the ground, for on his own statement this objection would have

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(1) (1868) 15 W. R. Cr. 71n, 73n.

(2) (1897) I. L. R. 22 Bom. 288.

(3) (1890) Punj. R., Cr. J. No. 16

(4) (1907) I. L. R. 35 Calc. 141

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no force in reference to the charge under section 121A, and it is with that section alone we are now concerned. I also hold that the objection to the proceedings on the ground of misjoinder of parties is not well founded and must fail.

Having thus disposed of the several objections to the legality of the present proceedings, I will deal with the merits; but before discussing the details of the individual cases, it will be convenient to take up certain general questions that call for consideration and decision.

And, first, I will deal with the objection that the confessions are not admissible, for this involves a question of vital importance. As I have already said, Mr. Birley purported to record them under section 164 of the Criminal Procedure Code. But it is urged that they do not come within the terms of this section, that there is no other section of the Criminal Procedure Code that can be called in aid by the prosecution, and that, apart from the Code, there is no provision of law under which their admission can be justified.

For the law relating to confessions, we must first turn to the Evidence Act passed with a view to consolidating, defining and amending the Law of Evidence, of which the law as to confessions forms a part. The relevance of confessions is defined in that catena of sections which come under the general heading "Admissions." Section 21 declares that admissions are relevant and may be proved as against the person who makes them, and a confession is an admission. Sections 24 to 29 qualify the generality of this provision, and of these sections 25, 26, and 27 practically reproduce sections 148, 149 and 150 of the Criminal Procedure Code of 1861. As these provisions were incorporated in the Evidence Act, which received the Governor-General's assent on the 15th of March 1872; they naturally did not find a place in the Criminal Procedure Code of 1872, which received the Governor-General's assent on the 25th of the same month.

The Criminal Procedure Code of 1872, however, was not wholly silent as to confessions, for by section 122 it empowered a Magistrate to record confessions in the manner therein

prescribed. This section roughly corresponds with section 164 of the present Criminal Procedure Code, by reference to which the present objection must be determined.

The objection to their admissibility under section 164 of the Criminal Procedure Code rests first on the contention that, when they were recorded, the enquiry had commenced, and next, on the fact that the Magistrate who recorded the confession was the Magistrate before whom the enquiry was conducted and by whom the order of commitment was made. In support of this view, reliance is principally placed on the Full Bench decision in *Empress v. Anuntram Singh* (1), which, it is argued, supports the view that, at the time when Mr. Birley recorded the confessions, the enquiry had commenced, and that he could not in the circumstances record the confessions under section 164. The decision in *Empress v. Anuntram Singh* (1) was on section 122 of the Code of 1872, and it will, therefore, be necessary to compare the provisions of that Code with those of the present Code in order to estimate the extent to which that decision can be regarded as a controlling authority for the purposes of this case. First, then, I will examine the provisions of the Code of 1898 and consider their application, apart from authority, to the circumstances of this case. Section 164 provides that—

(1) Every Magistrate not being a police officer may record any statement or confession made to him in the course of an investigation under this Chapter, or at any time afterwards, before the commencement of the inquiry or trial.

(2) Such statement shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be enquired into or tried.

(3) No Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe

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(1) (1880) I L R. 5 Calc. 954.

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that it was made voluntarily ; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect :—

I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Sd.) A. B.

Magistrate.

Therefore, to come within the scope of this section, a confession must be made either (i) in the course of an investigation under Chapter XIV, or (ii) at any time afterwards before the commencement of the enquiry or trial.

An investigation includes all proceedings under the Code for the collection of evidence conducted by a police officer [section 4 (b)], and there can be no doubt on the facts that the confessions in this case were made in the course of an investigation under Chapter XIV. But, then, it is said that this is immaterial, as they were not made before the commencement of the enquiry. To this, however, the answer is that the condition requiring the confession to be prior to the commencement of the enquiry is only imposed when the investigation has ceased, and not when it is made in the course of the investigation.

This appears to me to be the true and natural meaning of this provision, which is a repetition of the provision to this effect contained in the Code of 1882, and I think this is none the less so because the punctuation in the Code of 1882 has not been retained. But even if it be assumed, for the sake of argument, that the commencement of the enquiry terminates the applicability of section 164, can it be said that on the 4th of May Mr. Birley had commenced the enquiry ? To determine this we must have regard to the words of the Code. Chapter XV deals with the jurisdiction of the Criminal Courts in Inquiries and Trials : the first group of sections, that is, sections 177 to 189, deals with " Place of inquiry or trial : " the second group is headed " Conditions requisite for Initiation of

Proceedings." Now section 190, which is the leading section of this group, indicates the conditions on which a Magistrate may take cognizance of an offence, that is to say, it may be (a) upon receiving a complaint, (b) upon a police report, or (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence had been committed. On the 4th of May there had been no complaint or police report, and the only information was received from Mr. Clarke, a police officer, who had taken part in the arrest, and possibly from Mr. Plowden, another police officer. But this information, being from a police officer, would not have justified Mr. Birley in taking cognizance, and it does not appear that he had any knowledge or suspicion apart from this information. It follows, therefore, that on the 4th of May none of those conditions had been satisfied on which alone cognizance could have been taken by Mr. Birley, and therefore the enquiry cannot then have commenced.

The necessary result of this train of reasoning is that the confessions in this case fall within the scope of section 164, if regard be had only to the words of the Code. But is there anything in the decided cases which precludes us from accepting this reading of the Act? Certainly not the case of *Empress v. Anuntram Singh* (1), for that was a decision on the Code of 1872, from which the words and provisions on which I have relied are absent. The same remark obviously applies to the decision in *Empress v. Yakub Khan* (2), which merely purports to follow the authority of *Empress v. Anuntram Singh* (1).

Moreover, it is to be noticed that in both those cases confessions were upheld on the ground that they did not come within section 122 of the Code of 1872, but within section 193, which, to some extent, resembles the present section 342. But words have been introduced into the present section which would make the decisions in those two cases impossible in these days. The decision in *Sat Narain Tewari v. Emperor* (3) has no bearing on the point I am now discussing, for there, in the

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(1) (1880) I. L. R. 5 Calc. 954.

(2) (1883) I. L. R. 5 All. 253.

(3) (1905) I. L. R. 32 Calc. 1085.

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opinion of the learned Judges, the Magistrate was carrying on an enquiry under section 202. Nor does *In the matter of Behari Hajdi* (1) throw any light on the present question. My conclusion, therefore, that the enquiry had not commenced is not disturbed by anything in the decided cases.

But, then, it is contended that as Mr. Birley was the Magistrate who conducted the enquiry and ultimately committed the appellants, he had no jurisdiction to record the confession. This argument rests on the decisions in *Reg. v. Bai Ratan* (2), and *Empress v. Anuntram Singh* (3) cited above. But both these decisions were on the language of the Code of 1872, which materially differs from that of the present Code. It is now provided that "every" Magistrate may record a confession, the word "every" being substituted for "any," and there has also been added the Explanation—"It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case."

These alterations make it clear that it can no longer be contended, on the strength of the decisions in *Reg. v. Bai Ratan* (2) and *Empress v. Anuntram Singh* (3), that a confession recorded by a Magistrate who afterwards conducts the enquiry is outside the provisions of section 164.

In the view I take, it is unnecessary to consider whether, if the enquiry had actually commenced on the 4th of May, the confessions would have been inadmissible. The authority of *Queen-Empress v. Narayan* (4) is opposed to this view, and the present inclination of my opinion is that the argument seeks to derive from the provisions of the Code a limitation on the law of confessions as defined by the Evidence Act for which there is no sufficient warrant.

Then, are the confessions vitiated by the fact that in some instances, and to some extent, the statements made were in response to questions? As far back as 1868 it was held by Sir Barnes Peacock in *Queen v. Nobodeep Chunder Gossamee* (5)

(1) (1879) 5 C. L. R. 238.

(3) (1880) I. L. R. 5 Calc. 954.

(2) (1873) 10 Bom. H. C. 166.

(4) (1893) Ratanlal's Unrep. Cr. Ca. 679.

(5) (1868) 15 W. R. Cr. 71n.

that a statement made by a prisoner in answer to questions were admissible against him, and now we have statutory recognition of this view in section 29 of the Evidence Act. Therefore, the mere fact that a statement was elicited by a question does not make it irrelevant as a confession. It is to be observed that Ullaskar in effect invited Mr. Birley to question him, and that he should in the circumstances have complied with the request cannot call for any adverse comment.

I do not, however, intend to indicate that the fact of statements being elicited by questions may not be very material to an enquiry as to whether the confession is voluntary or not. On the contrary, there are circumstances in which it may be a most material fact, for, unhappily, not merely involuntary, but actually false confessions come before the Courts. Indeed, it may be a question whether such a confession has not come to light in the course of these proceedings, as it has been stated before us by Mr. Norton that, for one of the attempted outrages on the late Lieutenant-Governor, disclosed by the confessions in this case, certain coolies have been tried and convicted and are still in prison, part of the evidence against them being their own confessions. If the confessions in this case are true, then, as Mr. Norton has remarked, there may be reason to apprehend that those coolies have been improperly convicted. Mr. Norton, who appeared for the Crown in that case as well as this, has submitted that the Government should be moved by us to release those coolies. It is outside our province to investigate this matter, but no doubt it will be made the subject of careful enquiry by the Government, if this has not already been done, and the representation of counsel for the Crown will be brought to the notice of the Government.

I will defer for the present considering how far the individual confessions in this case are or are not voluntary, for this enquiry will be more conveniently pursued as each confession comes to be separately considered. But, apart from this, the result is that in my opinion Mr. Birley has complied with all the provisions prescribed by section 164 of the Criminal Procedure Code, so that the presumption indicated in section 80 of the Evidence

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Act applies. In addition to that, he has given evidence at the trial affirming his belief that the confessions were voluntary, and, in the circumstances, I hold that the confessions have properly been admitted in evidence by the Sessions Judge. The Sessions Judge has relied largely on these confessions, and in this I think he was justified; for, while fully realising the caution and reserve with which confessions must ordinarily be accepted, those with which we are concerned in this case are so exceptional as not to create in my mind the slightest apprehension of sinister influence or pressure.

[His Lordship then dealt with the evidence of the watch or shadowing witnesses, and continued:]

Next, Mr. Das has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still the provisions of the Criminal Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For, without in any way countenancing disregard of the provisions prescribed by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those provisions were disregarded. As Jimutavahana with his shrewd common sense observes—"a fact cannot be altered by 100 texts," and as his commentator quaintly remarks: "If a Brahmana be slain, the precept 'slay not a Brahmana' does not annul the murder." But the absence of the precautions designed by the legislature lends support to the argument that the alleged discovery should be carefully scrutinized. In this case there do seem to have been some irregularities. In the case of some searches there were not the two witnesses directed by the Code, while in the case of others it is at least problematical whether the witnesses called in comply with the statutory test of being "respectable inhabitants of the locality."

But it is the searches at the garden that have been most vigorously attacked. The first of these was on the 2nd May,

and was conducted by several police officers. The search witnesses were three—Sheikh Wazir, Sheikh Monglu and Sheikh Mengree,—but they were not called as witnesses at the trial. The Code requires that a list of all things seized in the course of the search and of the places in which they are respectively found shall be prepared by the officer or other person making the search and signed by the witnesses, and a copy of the list prepared signed by the witnesses is to be delivered to the occupant at his request (section 103). Lists were prepared in consequence of this search, but one of the questions is whether, as the prosecution allege, they were prepared at the time in the garden, or, as the defence contend, subsequently at the police station. Notwithstanding the sworn testimony, I am doubtful whether the search lists were completed at the garden. The alteration on the 5th sheet of the hours of search hardly agrees with the theory that it was a contemporaneous record: the presence of fourteen names at the head of the search list instead of 18 is to some extent remarkable, and the appearance on documents found at 15 Gopi Mohan Dutt's Lane of the signature of garden witnesses is calculated to rouse doubt and certainly points to some degree of confusion at the Park Street police station. On the whole, I am not convinced that the search list was completed at the garden. But this is more a matter of form than of substance, except so far as it necessitates careful enquiry as to whether the articles and documents shown in the garden list were in fact found in the garden. And in the view I take, this is only of importance in reference to item 84, for in view of Arabinda Ghose's acquittal the alleged discovery of Ex. 1128 at the garden loses its significance.

[His Lordship then referred to the documents discovered at the various searches, which were made exhibits in the case, and continued :]

In dealing with documentary evidence, it is necessary to keep carefully in view the use to which it can legitimately be put, having regard to the proof by which it is brought on to the record. A document may, for example, be used in evidence

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for the purpose of affecting some one with knowledge of its contents, regardless of whether those contents are true or false, or for the purpose of proving the truth of that which it contains; but from the fact that a document may be relevant for the first purpose, it by no means follows that it is relevant also for the second.

This distinction is so obvious that I should not have deemed it necessary to refer to it, but for the course this case has taken before us. Excluding for the moment exceptional cases, there can be no doubt as to the general rule that the fact that a statement is made in a private document is not by itself proof of its truth or any more admissible to prove the truth of the matter stated than an oral statement by the same person would be. Writing does not by itself give any greater sanction to the statement, or take the place of the sanction imposed by law. But at the same time a statement, whether oral or written, can be used against a person to prove the truth of the matter stated, if, as against him, it can be regarded as an admission. But the facts must be proved by virtue of which it can be treated as admission.

If the admission was actually written by him, and it is on this ground that it is sought to be used, then the fact that it was so written must be proved by those methods which the law allows.

The ordinary methods of proving handwritings are (i) by calling as a witness a person who wrote the document or saw it written, or who is qualified to express an opinion as to the handwriting by virtue of section 47 of the Evidence Act; (ii) by a comparison of handwriting as provided in section 73 of the Evidence Act; and (iii) by the admission of the person against whom the document is tendered. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear.

In applying the provisions of section 73 of the Evidence Act it is important not to lose sight of its exact terms. It does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made, or

the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard or, in other words, the disputed writing, must *purport* to have been written by the same person, that is to say the writing itself must state or indicate that it was written by that person.

The section does not specifically state by whom the comparison may be made, though the second paragraph of the section dealing with a related subject expressly provides by way of contrast that in that particular connection the Court may make the comparison.

In this case we are told that a comparison was made by the learned Sessions Judge out of Court after the conclusion of the arguments, but whether with the assistance of the assessors or not does not appear. If there was no submission of this question to the assessors, it may be a question how far this was not an irregularity. The result has been that on a comparison so conducted the learned Sessions Judge, without in all cases observing the precise terms of the section, has held certain writings to be those of one or other of the accused without having invited or heard arguments from their counsel on this point. I cannot think this was a proper course to pursue : a comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. In *Phoodée Bibee v. Gobind Chunder Roy* (1), it was said by the Court that "a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution."

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In this case no expert has been called to assist the Court, and not because no expert was available : there is, it is well known, a Government expert as to handwriting, and certain of the documents in this case bear a stamp which shows that they have been submitted to them. It is true that the opinions of experts on handwriting meet with their full share of

(1) (1874) 22 W. R. 272.

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disparagement at times, but at any rate there is this use in their employment, that the appearances on which they rely are disclosed, and can thus be supported or criticised, whereas an opinion formed by a Judge in the privacy of his own room is subject to no such check. And that the aid of an expert may be of value was clearly the opinion of so distinguished a Judge as Mr. Justice Blackburn, who in *Reg. v. Harvey* (1) refused to allow a comparison to be made without the help of experts. But whether there has been irregularity or not is of no great moment in the view I take, for after making such comparison as the section permits, I am unable to hold that in any case handwriting has been proved by this method.

But to be an admission, it is not necessary that a document should have been written by the person against whom it is sought to be used : it is sufficient if it be proved that the document has been in his possession, and that his conduct in reference to it has been such as to create an inference that he was aware of its contents and admitted their accuracy. Unless this be done, the document cannot be used as proof of its contents.

What conduct would properly give rise to such an inference must necessarily depend on the circumstances of each case. Mere possession of letters would not ordinarily go for much, and the value of such possession must largely depend upon whether it can be shown that their contents have been recognised and adopted by the replies they may have elicited, or the conduct they may have inspired. If no such consequence can be traced, their value must necessarily be materially discounted.

Considerable use has been made of the provisions of section 10 of the Evidence Act in the present case, and it, therefore, is important to observe that its operation is strictly conditional upon there being reasonable ground to believe that two or more persons have conspired together to commit an offence. Regard must also be had to the limits within which this class of evidence can be used.

Section 30 of the Evidence Act may also here be noticed as of cognate bearing, for by its terms the Court "may take into

(1) (1869) Cox. 11 C. C. 546.

consideration" the confession of one of several persons jointly tried for the same offence against his co-accused as well as against himself. The confession is not evidence against the co-accused in the sense that a conviction on that alone could be supported; it can only be taken into consideration, that is to say, it can lend assurance to other evidence. The confessions in this case have been largely employed for this purpose.

[His Lordship then examined the contention of the prosecution that the "*Jugantar*" newspaper was a limb of the conspiracy, and proceeded:]

I have already dealt with the legal objections to the charges, and it will now be convenient that I should discuss generally, and not in relation to any individual case, the legal aspect of these charges. They are all based on sections 121, 121A, and 122 of the Indian Penal Code.

Section 121 is in these terms:—"Whoever wages war against the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or transportation for life, and shall forfeit all his property."

It is argued on behalf of the Crown that it was intended by the framers of the Indian Penal Code to reproduce the English law of treason in its entirety, that is to say, not only the Statute Law, but also the interpretation placed on it by the cases. But any one who has studied the history of section 121, which was a part of the law of the land before its incorporation in the Indian Penal Code, and the literature on the subject, must know that this was not the intention of those who framed the provision.

As in my opinion the first batch of appellants could not legally be convicted of an offence under section 121, and, as in the view I take of the facts established against the rest, no offence under the section has been established, I think it right to refrain from discussing in detail the meaning of section 121, for in the circumstances the question does not arise. Still I consider the view originally taken by the Government that the case did not fall within section 121 was manifestly right, and

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the change from this view, induced as has been indicated, was mistaken.

So far as conspiracy is charged, the case rests on section 121A., which provides that, "Whoever within or without British India conspires to commit any of the offences punishable by section 121, or to deprive the Queen of the sovereignty of British India, or of any part thereof, or conspires to overawe, by means of criminal force or the show of criminal force, the Government of India or any Local Government, shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years."

"*Explanation.* To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof."

"A conspiracy," it has been said, "consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means The number and the compact give weight and cause danger" [*Mulcahy v. Queen* (1)].

One of the assessors in coming to the conclusion that there was no conspiracy seems to have been influenced by the view that there was not "an immediate purpose," but that the objective was "a far-off revolution." But the question to be determined is whether there was an agreement between two or more of the accused to do all or any of the unlawful acts charged. The fact that the purpose was not immediate, if it be a fact, would only be material in so far as it might bring the matter within the saving operation of section 95 of the Indian Penal Code, but I can find no trace of any suggestion to that effect before the Court of Session, and certainly no reference has been made in this Court to that section.

(1) (1868) L. R. 3 H. L. 306, 317.

Baren in his confession no doubt speaks of a far-off revolution, but then he goes on to say that they wished to be ready for it, and so were collecting weapons in small quantities. Major Black, the Chemical Examiner, says that, taking all the articles he had seen from all the places, he should take the costs to be from Rs. 5,000 to Rs. 6,000, and the overt acts disclosed by the evidence, though not in themselves a waging of war, make it plain that there was no reluctance to use explosives to the peril of human life and for the purposes of assassination. It is, therefore, impossible to treat the conspiracy charged as childish or negligible: to those who were members of it the movement meant something that was real and earnest, and it does not detract from the quality of the offence that the object in view was not likely to be realized, though this may be relevant to the question of punishment where the offence is established.

Though to establish the charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each others presence; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design.

So again it is not necessary that all should have joined in the scheme from the first: those who come in at a later stage are equally guilty, provided the agreement be proved. And this leads me to notice an argument advanced on behalf of the defence that all charged as conspirators must be convicted or all acquitted. The *Queen v. Manning* (1) was cited as an authority for this proposition, but that case turns on the fact that only two persons were charged, so that both had to be convicted. And this for a very good reason. An agreement implies the concert of at least two persons, so that *ex vi termini* there cannot be a conspiracy of one. Though this is somewhat obscured by the line of reasoning in the judgments, the fact is placed beyond doubt by the judgment of Wright. J., in *King v. Plummer* (2). The objection, therefore, fails.

(1) (1883) 12 Q. B. D. 241.

(2) [1902] 2 K. B. 339.

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Though the appellants have, with a few exceptions, all been convicted under section 122 as well as under sections 121 and 121A, it is conceded by Mr. Norton that what is established under section 122 really is a part of, and goes to make up the offence under, section 121A, so that a separate conviction and punishment under section 122 is not sought by the Crown.

Another matter to which I desire to allude is the general character of the evidence. From the nature of the case it is to a large extent circumstantial, and in dealing with it the rules specially applicable must be borne in mind. There is always the danger in a case like the present that conjecture or suspicion may take the place of legal proof, and therefore it is right to recall the warning addressed by Mr. Baron Alderson to the Jury in *Reg. v. Hodge* (1), where he said "the mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

The mass of material that has found its way on to the records in this case, sometimes without a clear perception of the extent to which it was admissible, has made our task peculiarly difficult, and has made it especially incumbent on this Court to realise and keep in mind that the rules of evidence cannot be departed from because there may be a strong moral conviction of guilt [*Queen v. Baijoo Chowdhry* (2)]; for a Judge "cannot set himself above the law which he has to administer, or make it or mould it to suit the exigencies of a particular occasion." One matter noticeable in the record of the proceedings before the Court of Sessions is the extent to which answers seem to have been elicited from prosecution witnesses by leading questions put to them by counsel for the Crown, and this appears to have been done notwithstanding the

(1) (1838) 2 Lew. 227.

(2) (1876) 25 W. R. Cr. 43.

objection raised by counsel for the defence. As I have noticed a similar procedure in other cases, I think it right to draw attention to the law governing this matter. Section 142 of the Evidence Act provides that leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination, except with the permission of the Court.

It is the Court, and not counsel for the Crown, who can determine whether leading questions should be permitted, and the responsibility for that permission rests on the Court. Now, not only were objections made by the counsel at the time, but a petition of objection was filed, and, from the order on its back, it appears that no permission was given by the Court, though the witness "had to be pressed in regard to many points." This, in the opinion of the learned Judge, did not amount to cross-examination. But the point for decision was whether leading questions were asked, and what is a leading question is defined in section 141 of the Evidence Act, which provides that "any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question." How Mr. Norton can have applied the pressure without the use of leading questions is by no means evident.

[His Lordship, after dealing with the case of each of the accused on the merits, concluded as follows.]

The result then is that the convictions and sentences against all the accused under sections 121 and 122 must be set aside, but, as against Barindra Kumar Ghosh, Ullaskar Dutt, Upen-dra Nath Banerjee, Indu Bhushan Roy, Bibhuti Bhusan Sircar, Hrishikesh Kanjilal, Sudhir Kumar Sircar, Hem Chandra Das, Pares Chandra Maulik, Sisir Kumar Ghose, Nirapada Roy and Abinash Chandra Bhattacharjee, the convictions under section 121A of the Indian Penal Code should, in my opinion, be confirmed.

The question of punishment is one of considerable difficulty : those who have been convicted are not ordinary criminals ;

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they are for the most part men of education, of strong religious instincts, and in some cases of considerable force of character. At the same time they have been convicted of one of the most serious offences against the State, in that they have conspired to wage war against the King, and the punishment must be in proportion to the gravity of the offence. For the purpose of punishment, Barindra Kumar Ghosh, Ullaskar Dutt, Upendra Nath Banerjee and Hem Chandra Das may properly be grouped together, for they were the leaders of the society, and Ullaskar Dutt and Hem Chandra Das actually manufactured bombs that were used. We sentence each of them to transportation for life. The next class includes Bibhuti Bhushan Sircar, Hrishikesh Kanjilal and Indu Bhushan Roy, whose prominence in the society is shewn by the part they took in one or other of the attempted outrages disclosed by the evidence in the case. We sentence each of them to transportation for a term of ten years. We sentence each of the following, *i.e.*, Sudhir Kumar Sircar, Pares Chandra Maulik, Abinash Chandra Bhattacharjee to transportation for a term of seven years. We sentence Sisir Kumar Ghose and Nirapada Roy respectively to five years' rigorous imprisonment.

Mr. Justice Carnduff and I are divided in opinion as to the conviction of Krishna Jiban Sanyal, Sushil Kumar Sen, Birendra Chandra Sen, Sailendra Nath Bose, and Indra Nath Nandi, so the case with our opinions thereon must be laid before another Judge of the Court as provided in section 429 of the Criminal Procedure Code.

CARNDUFF J. I agree with most, but unfortunately not with all, of the conclusions arrived at by my lord the Chief Justice on this appeal. Our difference of opinion is, in effect, limited to the question whether the guilt of five of the appellants has been proved or not. But there are some remarks which I feel called upon to make, as briefly as may be, on my own account, both on the case as it presents itself to me as a whole, and on certain points connected with it, although we are in substantial agreement regarding them.

First, as to the facts generally, the case for the prosecution is that definite information of the existence of a secret society formed with the object of subverting the King-Emperor's government in India was obtained by the Criminal Investigation Department in October 1907, and that that information was confirmed shortly afterwards by the futile attempt which was made to wreck the Lieutenant-Governor of Bengal's special train at Naraingarh in the following December. In consequence, steps were taken to unravel the plot and expose the plotters, and detective police, as well as spies, were as usual employed towards that end. According to Inspector Biswas, there were as many as twenty officers, from the Inspector-General downwards, connected with the investigation; but, as was only natural where the greatest secrecy and circum-spection were essential, the immediate control of it seems to have remained in a few hands. Suspected persons were shadowed, their associates—for association must be the basis of all conspiracy—were noted, their haunts were marked, and suspicious movements, both of individuals and of materials, were watched. Vigilance was, we are told, redoubled when a bomb, which failed to explode, was thrown into the residence of the Maire at Chandernagore on the 11th March 1908, and when the warning was received, on the 20th April, that the life of the former Chief Presidency Magistrate of Calcutta was in danger. On the 30th April two ladies were killed at Mozufferpore by means of a bomb evidently intended for Mr. Kingsford, and on the 2nd May and following days, further delay being felt to be impossible, the police acted upon such information as they had collected so far, and with startling results. Various places were raided, the first being the so-called "garden" in Maniktollah, belonging to the family of the appellant Barindra Kumar Ghose. Explosives and materials connected with the manufacture of explosives, as well as innumerable documents and other things, some more or less suspicious and some apparently innocuous, were seized; and a number of dramatic arrests, followed in some instances by equally dramatic statements of an incriminating character, were made. These broad facts are

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hardly disputed and may be regarded as indisputable; and thus the prosecution has undoubtedly had the advantage of starting from very firm ground.

But, when one is at the outset strongly impressed with the truth of a case as a whole, it is obviously all the more necessary to be on one's guard against approaching with prejudice or unconscious bias the respective cases of the individuals concerned; and, as the learned Chief Justice has put it, one must be very careful not to allow conjecture or suspicion to take the place of legal proof. With all that his Lordship has observed on this point and as regards the necessity for adhering to the rules of evidence throughout I fully concur. But "legal proof" is, as it seems to me, neither more nor less than what is indicated by the definition of the word "proved," which is to be found in section 3 of the Indian Evidence Act, 1872: that is to say, "a fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." When the section speaks of "the matters before" the Court, it means, of course, the matters properly before it. Whence it follows that, if and when irrelevant matter has been admitted in evidence, one must be careful—I would here refer to the provisions of section 167 of the Evidence Act—to exclude it from consideration and refuse to be in any degree influenced by it. But, given evidence on the record which is admissible, and excluding from consideration any that may have been wrongly admitted, I doubt whether it is possible to draw a distinction between "legal proof" and "moral conviction."

I will now address myself to the attacks that have been made generally on the evidence for the prosecution, which may be described as consisting in the main of—

- (i) the depositions of the shadowing witnesses;
- (ii) the findings at the various searches; and
- (iii) the confessions and statements of certain of the appellants.

[After dealing with the first two points, his Lordship continued as follows :]

There remain, in connection with the evidence, the confessions which were recorded by the District Magistrate, Mr. Birley, shortly after the arrests, and which, I agree with the learned Chief Justice in holding, were undoubtedly admissible. The decision of the Full Bench of this Court in *Empress v. Anuntram Singh* (1) is now obsolete, and there is nothing in the present Procedure Code to incapacitate from recording a confession under section 164 the Magistrate who intends eventually to try the person confessing. I further concur in holding that the confessions were recorded under that section; for, as a matter of fact, the police investigation had not come to an end, and the magisterial enquiry had not, and could not have, commenced when Mr. Birley recorded them. I am also of opinion that, even if section 164 were held to be inapplicable, the provisions of that section and of sections 342 and 364 of the Procedure Code are not exhaustive and do not limit the generality of section 21 of the Evidence Act as to the relevance of admissions. Finally, as to the voluntary character of the confessions in this case there can be no question. Mr. Birley is a Magistrate of experience and standing, and he appears from the record itself, as well as from the evidence given by him on the point, to have done all that in him lay, and even more than the law expressly requires, to satisfy himself that they were genuine before he received them. He warned each person that he was a Magistrate, and that any statement made to him might be used in evidence; and he put direct questions as to the presence or absence of pressure. It is true that the confessing accused had been in police custody for some time; but the chief of them, Barindra, had, immediately after the arrests in the garden, pointed out the most damning evidence on the spot, not only to the police, but to Major Black, I.M.S., the Chemical Examiner, also. Moreover, the education and intelligence of the accused, the tenor of their confessions, and

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especially the reasons for confessing vouchsafed by Barindra and repeated by some of the others, all point to the one conclusion that they were free agents. It has, however, been objected that their confessions were made in answer to enquiries, and that no question ought to have been put to any of them beyond some such initial query as "What do you wish to say, if anything?" Now, although section 29 of the Evidence Act expressly provides that a confession does not become irrelevant merely because it was made in reply to questions, no matter what their form, which need not have been answered, yet there can be no doubt but that a process of examination may detract from the voluntary character of the transaction, and that, where there is ground for thinking that there has been any such result, the confession is vitiated thereby. But here there is no reason to suspect anything of the kind, and the voluntary character of all the statements recorded by Mr. Birley stands unimpaired. Moreover, their truth has not to this day been denied by any of the appellants except Sudhir Kumar Sirkar and Krishna Jiban Sanyal. These two retracted their confessions and alleged police pressure when they were examined on the 13th August 1908, prior to their commitment; but the others contented themselves with bare and belated withdrawals made when the trial began in October. And I cannot accept the proposition, urged by Mr. Das, that in no circumstances is a Magistrate justified in eliciting anything from a prisoner by independent enquiry. The examination provided for by section 342 of the Procedure Code is, no doubt, expressly and advisedly now confined to the object of "enabling the accused to explain any circumstances appearing in the evidence against him;" but there is no such limitation placed by section 164, or by any other provision of law of which I am aware, and in the stage of investigation before any evidence has been recorded there is obviously no room for the limitation. At that stage, and, indeed, at any point other than that indicated in section 342, the only thing that is abhorrent is pressure or inducement, and the sole criterion by which the fitness of an examination can, so far as I can see, be judged, is with reference to the question

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whether it was voluntary or not. Therefore, holding as I do that Ullaskar Dutt, for example, was a ready and willing informant, I consider that the questions put to him were all proper questions, and that when he was asked "Have you anything else to say?" and replied "If you question me I can say," Mr. Birley not only was right in putting further questions to him in response to the invitation, but might reasonably have been found fault with had he refrained from doing so. Similarly, when Barindra told the Magistrate that he had supplied the Mozafferpore assassins with revolvers, the Magistrate was, I think, justified in enquiring whence the revolvers had been obtained, while the reply "I do not wish to say" and its immediate acceptance as putting an end to the topic, show how scrupulously and admirably fair Mr. Birley's treatment of the prisoner was.

There is, however, one remark regarding confessions which I am anxious to add before leaving the subject. For very obvious reasons, there can be no surer foundation for conviction. But, for equally obvious reasons, confessions have always been, and always will be, regarded by Judges with suspicion, and I trust that nothing I have said in this judgment will be viewed as an incentive to the police to aim at securing evidence of this class. My remarks should, therefore, be read with reference to the particular confessions before us, most, if not all, of which may be said to be *sui generis*.

Various other points of law have been raised in the course of the argument at the Bar, and as to most of them, all I need say is that I concur with the learned Chief Justice. There are, however, three which I have special reasons for desiring to notice.

First, Mr. Das has contended that the Criminal Procedure Code, in so far as it interferes with the indefeasible right of every British subject, be he European or Indian, to be tried by jury, is void as being *ultra vires* of the Indian Legislature; and my lord the Chief Justice has disposed of the contention by pointing out that a similar objection recently failed before a Special Bench of three Judges of this Court, constituted

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under section 11 of the Indian Criminal Law Amendment Act of 1908, to try the case of the *King-Emperor v. Kartik Chandra Dutt* and others. As that case has not been reported, as I was a member of the Special Bench by which it was tried, as the decision in it was arrived at by us sitting on the Original Side, and as Mr. Das pressed his contention in all seriousness, with great skill and at considerable length, I cannot refrain from dealing further with the point.

Shortly put, Mr. Das' argument is based upon section 22 of the Indian Councils Act, 1861 (24 & 25 Vict., c. 67), where it stands enacted by Parliament that "the Governor-General in Council shall not have the power of making any laws and regulations which shall repeal or in any way affect . . . any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom." And he argues that, as allegiance and protection are reciprocally due from the subject and the Sovereign and cannot be separated, any law which attempts to take away the Sovereign's protection by infringing such a right, conferred to secure the liberty of the subject, as the right of trial by jury, at the same time relaxes the duty of the subject to observe allegiance towards his Sovereign, and is, therefore, *ultra vires*. Precisely the same line of argument was followed in 1870, once on the Original Side of this Court and again on the Appellate, in the well known case of *In the matter of Ameer Khan* (1) in connection with the question whether a writ of *habeas corpus* could be issued in respect of the detention in the mufassil of a Mahomedan subject of the Crown under the State Prisoners' Regulation of 1818 and the State Prisoners' Act of 1858; and I cannot do better than quote from the judgments then given by Phear and Markby, JJ., when dismissing the appeal from the refusal of Norman, J., to issue the writ. The Statute under consideration on that occasion was section 43 of the Government of India Act, 1833 (3 & 4 Will. 4, c. 85); but the language was, word for word, the same as that reproduced

(1) (1870) 6 B. L. R. 392 and 459.

above from the Statute of 1861, which in this respect merely repealed and re-enacted the earlier provision. Mr. Justice Phear (see page 477 of the report) thought that the words in question "did not refer to any assumed conditions precedent to be performed by or on behalf of the Crown as necessary to found the allegiance of the subject, but to laws or principles which prescribed the nature of the allegiance;" and he went on to say that "the learned counsel appeared to him at this stage of his argument to be endeavouring to convert a political sentiment into a principle of law." And Mr. Justice Markby (see pages 481, 482) followed with these trenchant observations:—

"It is said that the Act of 1858 was an excess of the power conferred upon the Indian Legislature . . . because it affects that part of the unwritten law or constitution whereon allegiance depends. . . . The restriction . . . is certainly couched in language to the last degree vague and obscure. Possibly a search into the discussions which preceded the Act might suggest a meaning; but I think that is a dangerous method of interpretation, and I would rather not resort to it. I think this objection is sufficiently answered by what appears to me to be a very clear principle; namely, that the allegiance of a British subject in no way whatever depends on the existence or non-existence of such a power as is conferred on the Governor-General by the regulation of 1818. I wholly repudiate the doctrine contended for, that the allegiance of a subject to his Sovereign can by any possibility be legally affected by the mere withdrawal from the subject of any right, privilege or immunity whatsoever. I think the notion of reciprocity expressed in the maxim *protectio trahit subjectionem, et subjectionio protectionem*, upon which this argument depends, is one which is wholly inadmissible in any legal consideration."

These remarks I would adopt and apply, *mutatis mutandis*, to Mr. Das's contention in this case. Moreover, trial by jury as known to the common law of England, that is to say, trial by the unanimous voice of twelve of one's peers, is unknown in India; and it seemed to Mr. Justice Harington, Mr. Justice Mookerjee and myself last March, as it seems to me today, that it is too late now to question the validity of every law regulating criminal procedure that has been enacted in this country under the Statutes of 1833 and 1861, and the legality of every trial held, whether by jury or with the aid of assessors, in the mufassal, or by jury before the Supreme or the High Court, during the last seventy-six years at least,

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Secondly, as regards the question of waiver, I agree in thinking it settled by authority—see the decision of this Court in 1880 of *In the matter of the petition of Quiros* (1), followed in 1888 by the Bombay High Court in *Queen-Empress v. Grant* (2), and in 1892 by the Madras High Court in *Queen-Empress v. Bartlett* (3), that an European British subject can relinquish his right to be tried as such, and that the appellant, Barindra Kumar Ghose, did so. And I would add that he seems to have acted deliberately and after the fullest warning and explanation of the position.

And, thirdly, I agree in considering that the expression “wages war,” which is used in section 121 of the Penal Code, must be construed in its ordinary sense as a phrase in common use in the English language, and that it is impossible to hold that any of the overt acts alleged in this case amount to the offence provided for by that section. The charge thereunder, therefore, fails on the merits, and the death sentences passed on Barindra Kumar Ghose and Ullaskar Dutt cannot be confirmed. I also think that there was no valid authority for the prosecution of the first batch of the accused on that charge, and I would endorse all the principles laid down by the learned Chief Justice in this connection; but, as his Lordship has indicated, a decision on the point is not, in the view which we take of the offence concerned, essential.

It remains for me now only to refer to the cases of the appellants individually. As regards (1) Barindra Kumar Ghose, (2) Ullaskar Dutt, (3) Upendra Nath Banerjee, (4) Hem Chandra Das, (5) Bibhuti Bhusan Sircar, (6) Hrishikesh Kanjilal, (7) Indu Bhusan Roy, (8) Abinash Chandra Bhuttacharji, (9) Nirapada Rai, (10) Sishir Kumar Ghose, (11) Paresh Chandra Maulik, and (12) Sudhir Kumar Sircar, I agree throughout with the learned Chief Justice, both in respect of the offences charged and in respect of the reduction of some of the sentences proposed now that the conviction for waging war, for which the minimum penalty fixed by law is transportation for life,

(1) (1880) I. L. R. 6, Calc. 83.

(2) (1888) I. L. R. 12, Bom. 561.

(3) (1892) I. L. R. 16, Mad. 308.

has been ruled out. And as to (13 Balkrishna Hari Kane, I also concur in thinking that there is room for considerable doubt, to the benefit of which he is, of course, entitled. But as regards the remaining five, namely, Susil Kumar Sen, Birendra Chandra Sen, Krishna Jiban Sanyal, Sailendra Nath Bose and Indranath Nandi, I regret that, for reasons which I have recorded separately, I cannot bring myself into agreement with my Lord.

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[His Lordship then dealt with the case of Susil Kumar Sen, and proceeded to discuss the case of Birendra Chandra Sen.]

I now come to Biren's conduct and admissions. Mr. Deputy Superintendent Kemp (W. 7) swears that he (Kemp) took a packet out of the canvas bag and put it down on the ground; that Biren thereupon, in a state of confusion and trembling, hurriedly picked it up; that he (Kemp) snatched it back and enquired what it was; and that Biren, then and there, correctly named the ingredients of the powder which it was eventually found to contain. According to Inspector Abdul Nur (W. 16), Biren distinctly said that "he had made it," adding what the Chemical Examiner, Major Black (W. 23), shows was literally true, namely, that "it was not an explosive yet;" and, according to Sub-Inspector Latif-ud-din (W. 17), he explained that "it was a kind of powder made by himself, and that he had been preparing it as an experiment to see whether it acted as an explosive or not." As regards the two note-books, Mr. Kemp says that Biren made a statement, but what the statement was, it would seem from the Sessions Judge's remarks, this witness was not allowed to say. The deposition of Abdul Nur, however, contains the assertion that Biren admitted that both the note-books had been written by him, while Latif-ud-din declares that Biren answered Mr. Kemp when the Deputy Superintendent asked him what the hieroglyphics in them were. Much stress cannot be laid on mere indications of emotion, and the fact that Biren was confused and trembled, is not, of itself, of importance; but what he really said and did not say at the time is, if relevant, of very considerable value. And

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this raises the important question whether his statements to the police are admissible, or whether they are "confessions," and, as such, ought not to have been received in evidence.

In *Queen v. Hurribole Chunder Ghose* (1), Garth C.J. and Pontifex J. held that what is described in the head-note as "a statement in the nature of a confession" was inadmissible under section 25 of the Evidence Act, it having been made to a police-officer. I have had the advantage of examining the actual statement as recorded by the police-officer concerned in that case; and I find that the prisoner, the charge against whom was abetment of the use as genuine of certain forged documents, admitted that he had, at the request of the principal accused, prepared a draft of a letter of advice (evidently one of the forgeries), that the principal had afterwards told him that "he had got a great lot of money on the draft," and that he had eventually received from the principal the sum of Rs. 8,300. Now this statement was treated, and referred to throughout, as a confession, and the Standing Counsel apparently never suggested that it was not, the only questions argued before the learned Judges being the questions whether Mr. Lambert, who had received and recorded the statement, and who was a Magistrate as well as Deputy Commissioner of Police, was a "police-officer" within the meaning of section 25, and whether that section was qualified by section 26. The ruling, therefore, seems to be of no assistance to us here.

The case of *Queen-Empress v. Mathews* (2) has also been relied upon by Mr. Das. In trying that case Mr. Justice Field, when excluding a statement made by the accused to a police officer, observed that the exact words used in such circumstances would not be evidence "if they amounted to an incriminating statement," and that the law was "imperative in excluding what comes from an accused person in custody of the police, if it incriminates him." But the learned Judge made these remarks in considering a hypothetical case put by the Standing Counsel for the Crown in support of the argument that he was entitled to clear up a matter left in doubt by the cross-examin-

(1) (1876) I. L. R. 1 Calc. 207.

(2) (1884) I. L. R. 10 Calc. 1022.

ation; and the statement which the accused, then on his trial for murder, was said to have made when arrested, was that something had happened "at the time he struck the deceased." Now, as was remarked by Halsbury, L. C., in *Quinn v. Leatham* (1), "a case is only an authority for what it decides;" and it seems to me that all that Mr. Justice Field decided in Mathews' case was that the statement quoted above amounted to a confession, a decision the justice of which, if I may say so without presumption, no one will dispute.

Then there is the case of *Queen-Empress v. Meher Ali Mullick* (2), on which special reliance has been placed by the defence. In that instance three persons, Meher, Bhutto and Torab, were accused of having murdered one Hurree, the theory for the prosecution being that the deceased had been strangled as the outcome of a dispute over a bill presented by him to Meher. The statements to the police, which were objected to as inadmissible, were statements made by Torab. "Hurree," Torab was said to have told the police, "came here yesterday at 1 P.M. Hurree and I and Bhutto and Meher Ali were seated in this room looking over his (Hurree's) account, when Hurree took sick with cholera; he went out three times to ease himself and came back and sat down, when angry words passed between him and Meher Ali." He appears also to have gone on to describe how Meher Ali "pushed Hurree in the throat" and made him insensible, and how the corpse was afterwards removed in a box. Mr. Justice Wilson, having—so the report runs—taken time till the following morning to consider the question, stated that he had come to the conclusion that evidence of these statements could not be given, but his Lordship gave no reasons, nor did he attempt to lay down any rule or enunciate any principle. Again, I venture to make the remark with which I concluded my notice of *Mathews' case* (3).

In *Imperatrix v. Pandharinath* (4) the charge was one of altering a forged cheque, and a policeman deposed that he had put the cheque into the accused's hands and asked him

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(1) [1901] A. C. 495.

(2) (1888) I. L. R. 15 Cal. 589.

(3) (1884) I. L. R. 10 Calc. 1022.

(4) (1881) I. L. R. 6 Bom. 34.

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whence he had obtained it, the accused's reply being that he had got it from a certain Kisan. Melvill and Kembball, JJ., refused to admit the statement, pointing out that, although it was probably made in self-exculpation, "it was nevertheless an admission of a criminating circumstance, on which the prosecution mainly relied, and (which) formed, indeed, the most important part of the evidence against the accused." They thought that "such an admission came properly within the rule of exclusion," and they consequently excluded it.

In *Queen-Empress v. Javecharam* (1) the following were the facts. Javecharam, a ticket-collector on the railway, was accused of having sold the Railway Company's tickets and misappropriated the proceeds, and one Ahmed was tried with him for having dishonestly received the "stolen property," namely, some of the tickets, which he also had been detected in the act of selling. Ahmed told the police that he had received these tickets from Javecharam, and Jardine and Ranade, JJ., ruled the statement out as inadmissible. They held, following *Imperatrix v. Pandharinath* (2), that it was "an admission of a criminating circumstance on which the prosecution evidently relied, and which had weighed with the Magistrate in his judgment on the facts," and that its admission was, therefore, "contrary to sections 25 and 26 of the Indian Evidence Act."

Per contra, Phear, J, in *Queen v. Macdonald* (3), pointed out that the Evidence Act had made a distinction between admissions and confessions, and allowed in evidence the statement made to a police-officer by a person arrested for theft and dishonest possession in respect of a watch, chain and cash, that his sister had given him the watch and the cash, and that he had bought the chain. Mr. Justice Prinsep acted apparently on the same distinction in *Empress v. Dabee Pershad* (4), but that case is not helpful, because the tenor of the accused's statement does not appear from the report. And in construing the provisions of section 148 of the Criminal Procedure Code of 1861, which corresponded with, and were replaced by, those

(1) (1894) I. L. R. 19 Bom. 363.

(3) (1872) 10 B. L. R. App. 2.

(2) (1881) I. L. R. 6 Bom. 34.

(4) (1881) I. L. R. 6 Cal. 530.

of section 25 of the Evidence Act, but referred to "confessions or admissions of guilt" and were, therefore, expressed in rather more, than less, comprehensive terms, Couch, C.J., had, in *Queen v. Amir Khan* (1), indicated, as it seems to me, the view that what an accused person has said to the police may not, though damaging, amount to a confession or an admission of guilt such as was then contemplated by the law.

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Finally, in the most recent case of the *Emperor v. Mahomed Ebrahim* (2) the accused was tried for the theft of a box, and a policeman gave evidence to the effect that he had seen him carrying the box at night, and that, when challenged, he had stated that the box was his own. The statement was found to be false, but it was nevertheless held by Crowe and Chandavarkar, JJ., to have been rightly admitted. "In order to determine," said the learned Judges, "whether the statement is a confession of guilt or an admission of a criminating circumstance, we must look to the statement itself. Here the statement of the accused was merely that the box belonged to him; it was no admission whatever of any criminating circumstance. It was, therefore, admissible. The statement held to be inadmissible in *Imperatrix v. Pandharinath* (3) was of a different character. There the accused's statement admitted possession of a cheque alleged to be forged. It was an admission of one of the criminating circumstances which went to make up the offence charged against the accused. In the present case the statement does not amount, directly or indirectly, to an admission of any criminating circumstance, and is, therefore, outside the principle of the ruling cited."

In the result, it seems to me that each case must be decided as it arises with reference to the question whether the particular statement concerned, whether it be positive or negative, verbal or expressed by conduct, is or is not a "confession." Here I am of opinion that not one of the statements attributed to Biren is an admission of guilt, and I consider that, although they undoubtedly tell against him, they were rightly received and

(1) (1871) 9 B. L. R. 36, 72.

(2) (1903) 5 Bom. L. R. 312.

(3) (1881) I. L. R. 6 Bom. 34.

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recorded by the Court below. I am also satisfied that they were actually made.

[His Lordship then discussed the evidence against Krishna Jiban Sanyal, Sailendra Nath Bose and proceeded to the consideration of the case of Indranath Nandi. After dealing with the main facts proved against Indranath, his Lordship dealt with the question of his connection with Taranath Chowdhry, and made the following observations as to the mode of proof of handwriting :]

There then arises the question whether Indranath's association with Taranath at any time has been established, and this depends to a large extent upon the answer to the further question whether certain of the letters found at the search of 4 Raja's Lane can be attributed to Indranath. Now, it is clear that the handwriting of these letters has not been proved in any of what may be styled the stereotyped methods of proving handwriting; for only one of those methods, and that the least reliable of all, namely, unaided comparison by the Court, seems to have been available. And even that method was resorted to under almost impossible conditions, because the sole standard of comparison was Indranath's signature, description and address, all in English, whereas the letters, apart from the superscriptions, are practically all in Bengali. The supposed author did not himself break silence either to admit or to deny the writing of any of them. His co-director Raghunath, declared that he was unacquainted with his Bengali signature and "not much familiar with his writing," while Mr. Norton seems to have either omitted to put, or refrained from putting, to Pabitra anything but Indranath's writing in English on the articles of association. Expert opinion on the point was not offered; and, even if it had been given in favour of identity, it could hardly, in the circumstances described above, have been of any real value or cogency. The stereotyped methods of proof thus went by the wall. But I am unable to concede, and I can find no authority for the proposition, that a particular individual's authorship of a document cannot be established

by the force of circumstantial evidence. Best, in discussing the subject of proof of handwriting under English law, begins—see *Best on Evidence*, ed. 10, p. 213—by expressly excluding cases in which the fact that a certain document was written is inferred from circumstances; and, under the law as codified for us in India, circumstantial evidence seems to me to be admissible in this, as in almost every other, connection. The stereotyped methods of proof are the usual methods, and that is probably why there is little assistance to be derived from the Law Reports on the point, which has consequently been argued before us as if it were one of first impression. There are, however, three cases reported in India which I have been able to trace, and these appear to me to support the view which I favour. In *Neel Kanto Pandit v. Juggobundhoo Ghose* (1) Mr. Justice Markby pointed out that section 67 of the Evidence Act had laid down no rule whatever as to the kind of proof of handwriting that must be given, but had left it, as before, entirely to the discretion of the presiding Judge of fact to determine what satisfied him that a particular document was a genuine one. The remarks of Couch, C.J., in *Abdool Ali v. Abdoor Rahman* (2) also tend to negative the idea that section 67 is in any way restrictive. And Farran, J., in *Abdulla Paru v. Gannibai* (3), observed that proof of handwriting “might of course be by any of the recognised modes of proof, and, amongst others, by statements admissible under section 32.” And one can readily imagine cases in which circumstantial evidence might be immeasurably superior to most, if not all, of the stereotyped media of proof. For example, A, whose credit is unimpeachable, is able to swear that B was the sole occupant of a room, and that, as soon as B left it, he (A) entered and found a letter, with the ink still wet, lying on the table. There could be no more convincing and conclusive evidence that B wrote that letter, however feigned the handwriting might be, however unlike B’s ordinary penmanship, however strong B’s denial. I cannot believe that the law would reject such evidence; I

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(1) (1874) 12 B. L. R. App. 18.

(2) (1874) 21 W. R. 429.

(3) (1887) I. L. R. 11 Bom. 690.

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can find nothing in the Evidence Act to exclude it ; but, on the contrary, it seems to me that it would be admissible under section 6, or section 7, or section 9, or section 11, and I consider that those provisions may be appealed to here.

[The case of the five prisoners, Krishna Jiban Sanyal, Susil Kumar Sen, Indranath Nandi, Birendra Chunder Sen and Sailendra Nath Bose, as to the guilt of whom their Lordships differed in opinion, was referred to Mr. Justice Harington, who, after rehearing the case of these prisoners, acquitted the three first, and convicted the remaining two under section 121 A of the Penal Code.]

E. H. M.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

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** Attestation—Document, execution of—Attesting Witness—Transfer of Property Act (IV of 1882) s. 59—Whether one joint executant of a deed can be treated as an attesting witness to the signature of the other—Pardanashin lady, whether an attesting witness should actually see the signature made, or the mark affixed by.*

When a document is jointly executed by more than one person in the presence of each other, each executant cannot be treated as an attesting witness in respect of the signature of every other executant.

For the purpose of valid attestation under s. 59 of the Transfer of Property Act, it is not essential that the witnesses should actually see the signature made, or the mark, seal or thumb impression affixed, but it would be sufficient if the execution took place in presence of the witnesses, although the executants were screened off from the gaze of the witnesses themselves.

APPEAL by Sarur Jigar Begum, the defendant No. 2.

This appeal arose out of an action brought by the plaintiff, Barada Kanta Mitter, to enforce a mortgage bond. The

* Appeal from Original Decree, No. 112 of 1906, against the decree of Bepin Bheary Mookerjee, Subordinate Judge of 24-Parganas, dated Feb. 20, 1906.

plaintiff stated that the bond was executed in his favour by defendants Nos. 1 and 2 on the 28th May 1898. The bond carried interest at the rate of 12 per cent. per annum, with quarterly rests, and was repayable on the 28th November 1898. It was further alleged that defendants Nos. 1 and 2 subsequently executed another mortgage bond in favour of defendant No. 3, and defendant No. 1 executed a third mortgage bond in favour of defendant No. 4, and that therefore they were made parties to the suit. The present suit was brought on the 11th of March 1905, inasmuch as the defendants did not pay anything towards the satisfaction of the mortgage debt, except four sums paid on account, of interest, the last of which was paid on the 11th of March 1902.

The defendant No. 1 admitted the execution of the bond and the receipt of the consideration money. The defendant No. 2, her sister, pleaded, *inter alia*, that she never borrowed any money from the plaintiff, that the mortgage deed was invalid, inasmuch as it was not duly attested as required by section 59 of the Transfer of Property Act, and that the suit was barred by limitation.

It appeared that at the time of the execution of the bond in favour of the plaintiff, the two ladies were seated behind the *pardah*. The first defendant put her signature; the second, being illiterate, put her mark, and her thumb impression was taken thrice, as the first and second impressions were not very distinct. Beneath her mark, her name was written by Prince Mookim who identified her. The document was explained by the solicitor, Jotindra Nath Bose, who, as well as Abdul Hossein, a servant of the first defendant, signed the deed as attesting witnesses. The solicitor was outside the *pardah*, and Abdul Hossein also did not actually see the second defendant put her mark on the deed. The deed was taken inside the *pardah* by Prince Mookim; but as the sister-in-law, the 2nd defendant, was not accustomed to appear before him, a wooden partition was set up to screen her from the view of the Prince, and it was from behind this wooden screen that she put her cross-mark and made her thumb impression.

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The Court of first instance having held that the several mortgage deeds were genuine, that they had been duly attested by witnesses, and that the payments alleged to have been made on account of interest had been made on behalf of both the mortgagors, decreed the plaintiff's suit.

Against this decision defendant No. 2 appealed to the High Court.

Babu Raghu Nath Singh and Babu Satis Chandra Mukherjee, for the defendant No. 2, appellant.

Babu Nilmadhub Bose, Babu Baidya Nath Dutt and Babu Mahendra Kumar Mitra, for the plaintiff respondent.

Babu Naliniranjan Chatterjee and Babu Lalit Mohan Ghose, for the defendant No. 3, respondent.

Moulvie Zahidur Rahim Zahed, for the defendant No. 1, respondent.

Cur. adv. vult.

MOOKERJEE AND TEUNON, JJ. This is an appeal on behalf of the second defendant in a mortgage suit. The mortgage security which the plaintiff respondent seeks to enforce is alleged to have been executed in his favour by the first two defendants on the 28th May 1898. The principal sum advanced is stated to have been Rs. 5,000, which carried interest at the rate of 12 per cent. per annum with quarterly rests, and was repayable on the 28th November 1898. The present action was commenced on the 11th March 1905, upon the allegation that nothing had been paid towards the satisfaction of the mortgage debt, except four sums paid on account of interest, namely, Rs. 150 on the 20th September 1898, Rs. 200 on the 16th February 1899, Rs. 400 on the 5th February 1901, and Rs. 600 on the 11th March 1902. The parties joined as defendants were the mortgagors (the first two defendants), a subsequent mortgagee, the third defendant, who claimed to have taken a security from the mortgagors on the 6th October 1902, and the fourth defendant, a third encumbrancer, who had taken a security from the first defendant mortgagor on the

26th September 1903. The first defendant admitted execution of the bond and receipt of the consideration. The second defendant, her sister, denied that she had taken the loan, alleged that the mortgage deed was invalid for various reasons, and further pleaded the bar of limitation. She also denied the mortgage in favour of the third defendant. The third defendant, the second mortgagee from both the mortgagors, prayed that provision might be made in the decree for the satisfaction of his debt after the claim of the plaintiff had been satisfied in full from the sale proceeds of the mortgaged premises. The fourth defendant, the third mortgagee from one of the mortgagors, made a similar prayer, but he put the plaintiff to the proof of his claim. On these pleadings, four issues were raised, the first of which covered the question of the genuineness of the mortgage transactions, so far as the second defendant was concerned, in favour of the plaintiff and the third defendant. The second issue related to the question of the validity of the mortgages, as affected by the omission of the mortgagors, who were the administrators of the estate of their father, to obtain the sanction of the Court which had granted letters of administration. The third issue related to the question of the payments of interest alleged by the plaintiff so as to save his claim for a personal decree on the basis of his mortgage. The fourth issue expressly raised the question of limitation. The Subordinate Judge found upon the evidence that the several mortgage deeds were genuine, that they had been executed by the defendants mortgagors and duly attested by witnesses, that the principal sums had been advanced as recited in the deeds, and that the payments alleged to have been made on account of interest had been made on behalf of both the mortgagors. He overruled the objection based on the ground of the failure of the mortgagors to obtain the sanction of the Court by which they had been appointed administrators, inasmuch as they acted in their capacity as the heiresses of their father, and not as administrators of his estate. As regards the alleged payments of interest, the Subordinate Judge found that the payments had been made through the husband of the first defendant on

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behalf of his wife, as also of his sister-in-law. In this view the Subordinate Judge decreed the claim, and directed that in default of payment to the plaintiff of the judgment debt within the period of six months specified in the decree, the mortgaged properties were to be sold, and out of the sale proceeds the plaintiff was to be paid first, then the third defendant out of the surplus left, and one-half of the balance, if any, was to be applied in satisfaction of the claim of the fourth defendant. The second defendant alone has appealed against this decree, and on her behalf the decision of the Subordinate Judge has been assailed substantially on four grounds : namely, *first*, that the mortgage deeds executed in favour of the plaintiff as also of the third defendant were not shown to have been duly attested, and were consequently inoperative as mortgage securities ; *secondly*, that the mortgage deeds were not proved to have been executed by her under such circumstances as would make them binding upon a *purdanashin* lady, that the deeds were not read over to her, and that the effect of the covenant for payment of compound interest was not explained to her ; *thirdly*, that the payments alleged to have been made were either not actually made at all, or, if made, were not made by an agent duly authorized by her in this behalf ; and, *fourthly*, that the decree as framed is erroneous, and not in accordance with the provisions of the Transfer of Property Act, which does not contemplate the payment of the dues of subsequent encumbrancers in an action by a prior encumbrancer to enforce his own security.

In support of the first ground urged on behalf of the appellant, it has been contended that, under section 59 of the Transfer of Property Act, the mortgage instrument to be operative as such must be attested by at least two witnesses, that an attestation by a witness who receives an acknowledgment of execution from the mortgagor is not sufficient, and that, in order to effect a valid attestation, the execution of the instrument must take place in the presence of the witness who sees the execution and affixes his signature in token of this fact. In support of these propositions, reliance has been placed upon the cases

of *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee* (1), and *Abdul Karim v. Salimun* (2). Reference was also made to the cases of *Ford v. Kettle* (3), *Raj Narain Ghosh v. Abdur Rahim* (4), *Dinamoyee Debi v. Bon Behari Kapur* (5) and *Sasi Bhusan Pal v. Chandra Peshkar* (6). In answer to these arguments, it has been contended on behalf of the respondents that the view taken in the cases of *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee* (1) and *Abdul Karim v. Salimun* (2) is erroneous, that the contrary view adopted in *Ramji Haribhai v. Bai Parvati* (7) and *Ganga Dei v. Shiam Sundar* (8) ought to be adopted; that in any event, on the analogy of cases relating to the attestation of wills, it is not necessary to prove that the attesting witness saw the execution of the deed, but that it is sufficient compliance with the law if the document is executed in his presence; and finally, that when the document is jointly executed by more than one person in the presence of each other, each executant may be treated as an attesting witness in respect of the signature of every other executant.

Before we deal with the question of law raised, it is necessary to ascertain precisely the circumstances under which the mortgage deeds in controversy in the present litigation were executed by the first two defendants. From the evidence, it appears that the mortgagors, Nawab Murtaza Begum and Nawab Sarur Jigar Begum, were daughters of Prince Sir Jahan Kader Mirza, nephew and son-in-law of the late King of Oudh. Their father died on the 16th April 1896; on the 15th September 1896 they took out letters of administration of the estate of their father from this Court in its testamentary and intestate jurisdiction. The two sisters at that time, and for several years afterwards, lived together in amity in their paternal house; and there is evidence to show that the younger sister, the second defendant, regarded her eldest sister almost as her mother. Some time after the marriage of the eldest sister in 1887, the younger sister had been married on the 7th February 1891.

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(1) (1898, I. L. R. 26 Calc. 246.

(2) (1899) I. L. R. 27 Calc. 190.

(3) (1882) 9 Q. B. D. 139.

(4) (1901) 5 C. W. N. 454.

(5) (1902) 7 C. W. N. 160.

(6) (1906) I. L. R. 33 Cal. 861.

(7) (1902) I. L. R. 27 Bom. 91.

(8) (1903) I. L. R. 26 All. 69.

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She lived with her husband for about two months, and then, at the request of her father, resided in his palace. After the death of her father she lived with her husband for a short time; but in February, 1898, there were differences between them, due, it is alleged, to the interference of the husband of the eldest sister. The result was a suit by the husband of the second sister for restitution of conjugal rights. This was commenced in 1899, and was decided by the Subordinate Judge on the 20th June 1900. It is fairly clear upon the evidence that at the time of the execution of the mortgage in favour of the plaintiff on the 28th May 1898 the two sisters lived together in peace and amity and there was entire mutual confidence between them. There is also no room for reasonable doubt that the terms between the sisters continued to be the same up to the time of the execution of the second mortgage in favour of the third defendant on the 6th October 1902. So far, therefore, as the suggestion is made that the second defendant had no independent advice at the time of these transactions, there is no solid foundation for it. She had the advice of her sister, a literate lady of considerable intelligence, whose interests were carefully watched by her husband, Prince Mirza Mahamad Mookim. It has indeed been suggested that the second defendant was betrayed by her eldest sister; that she never received any portion of the mortgage money; that she took no part in the mortgage transactions; and that, in substance, there were elaborate schemes prepared by her sister and her brother-in-law with a view to defraud her. These allegations have, in our opinion, been recklessly made, and have not been established by the evidence on the record. It is further plain that the two ladies, after the death of their father, got involved in expensive litigation regarding his estate, and considerable sums were needed to pay the solicitors and to meet the other costs of the litigation. Under these circumstances, we feel no doubt whatever as to the substantial truth of the story of the execution of the first and second mortgages by the two sisters as told in the Court below by the witnesses on behalf of the plaintiff and the third defendant. The first

defendant was examined on commission at considerable length, and upon her testimony, which we see no reason whatever to distrust, it is proved that the two sisters executed jointly the two mortgage bonds and received the consideration money. The documents were read over and explained to them; and there is no reason to suppose that they did not fully appreciate the meaning and effect thereof. The first defendant admits, with perfect frankness, that the transactions were genuine, and that she and her sister executed the deeds on receipt of the consideration, and with full knowledge of their contents. We have also the evidence of Jotindra Nath Bose, a solicitor of this Court, in whose presence the deeds were executed, and he is fully supported by Mahamad Abdul Hossein and the husband of the first defendant, Prince Mookim. Under these circumstances, the denial of the second defendant cannot be accepted as trustworthy, and her deposition, recorded at great length by the Commissioner, when closely examined, does not produce a favourable impression as to the truth of her allegations. The only question, therefore, which really requires consideration is whether the two mortgage deeds were duly attested, as required by section 59 of the Transfer of Property Act, which provides that a mortgage, when the principal money secured is Rs. 100 or upwards, may be effected only by a registered instrument, signed by the mortgagor and attested by at least two witnesses.

So far as the first mortgage bond, which is the foundation of the claim of the plaintiff is concerned, the evidence shows that at the time of the execution the two ladies were seated behind a *purdah*. The first defendant put her signature, the second, who was illiterate, put her mark, and her thumb impression was taken thrice, as the first and second impressions were not very distinct; beneath her mark, her name was written by Prince Mookim, who identified her. The document was explained by the solicitor, Jotindra Nath Bose, who, as well as Abdul Hossein, a servant of the first defendant, signed the deed as attesting witnesses. It is admitted that the solicitor was outside the *purdah*, and so far as we can gather from the

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evidence, Abdul Hossein also did not actually see the second defendant put her mark on the deed. The deed was taken inside the *purdah* by Prince Mookim, but as his sister-in-law was not accustomed to appear before him, a wooden partition was set up to screen the second defendant from the view of the Prince, and it was from behind this wooden screen that she put her cross-mark and made her thumb impression. Prince Mookim asserts that the second defendant put her cross-mark and thumb impression in his presence, and it is possible that, in spite of the wooden partition, he was able to see the hand of his sister-in-law, for the first defendant states that her sister put her hand out from behind the partition, *purdah*, and made her thumb impression before her husband. The position, therefore, appears to have been this. The solicitor, Jotindra Nath Bose, was outside the *purdah*; Prince Mookim, with the document in his hand, went inside where the two ladies were seated; a wooden partition was then put up to screen the second defendant from her brother-in-law. Prince Mookim saw his wife and his sister-in-law both execute the document. Abdul Hossein, the servant of the first defendant, was also inside the room, but he did not actually see the second defendant put her mark or her thumb impression on the deed; he, however, signed the deed as an attesting witness in the presence of the ladies; when the document was brought outside, Prince Mookim signed the deed in token of his identification of the signature, mark, and seals of the ladies. Jotindra Nath Bose, solicitor, also signed as an attesting witness. So far as the second mortgage bond of the third defendant is concerned, the circumstances were somewhat similar. On the face of that document, there appear the signature of the first defendant, the mark of the second defendant as well as her thumb impression and her name written underneath by the pen of Prince Mookim. Jotindra Nath Bose and Prince Mookim signed the document as attesting witnesses. Besides, the evidence of the first defendant as to the precise circumstances of the execution and attestation of the second deed, we have the deposition of the solicitor and of Prince Mookim. As in the case of the first deed,

the solicitor remained outside the *purdah* ; Prince Mookim took the document inside and it was executed in his presence ; it was then brought outside and signed by the solicitor and the Prince as attesting witnesses. Upon these facts, it has been argued, on behalf of the second defendant, that neither of the two deeds was validly attested, so far as she is concerned, because there were no two persons who had actually seen her execute the document, and subsequently attested it in token thereof. On behalf of the plaintiff and third defendant, it has been argued in reply, *first*, that as the first defendant undoubtedly saw her sister execute the document, she may be regarded as an attesting witness ; and *secondly*, that for the purpose of valid attestation, it is not essential that the witnesses should actually see the signature made, or the mark, seal, or thumb impression affixed, but that it is sufficient compliance with the law if the execution takes place in the presence of the witnesses, although the executants are screened off from the gaze of the witnesses themselves. In support of this latter proposition, reliance has been placed upon the cases of *Har Mongal Narain Singh v. Ganaur Singh* (1) and *Isri Prosad v. Rai Gunga Prosad Singh Bahadur* (2).

In so far as the first of the two propositions which we are invited by the respondents to accept, is concerned, we are unable to adopt it either as well founded on principle or supported by authorities. In the Laws of England, edited by Lord Halsbury, Vol. X, page 389, it is stated that the attesting witness must be some person who is not a party to the deed ; and a statement of its execution in his presence should be written on the deed and signed by him. This view is supported by cases of the highest authority, based on principles not peculiar to English jurisprudence. Thus in the case of *Freshfield v. Reed* (3), in answer to an argument that the parties to a document should be considered as so many attesting witnesses in respect of the execution, it was ruled that the term "attested" manifestly implies that a witness shall be

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(1) (1907) 13 C. W. N. 40.

(2) (1909) 14 C. W. N. 165.

(3) (1842) 9 M. & W. 404 ; 60 R. R. 769.

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present to testify that the party who is to execute the deed has done the act required, the object of which is that some person should verify that the deed was signed voluntarily. Again, in the case of *Wickham v. Marquis of Bath* (1), it was ruled by Romilly, M. R., that co-executants cannot be regarded as attesting witnesses, because they do not sign the deed for the purpose of attesting the execution, but with the object of conveying the interest they have in the property transferred. The same view is supported by the case of *Seal v. Claridge* (2), where Lord Selborne held that a person who is a party to the deed cannot be regarded as an attesting witness, on the ground that if the person for whose benefit the instrument is executed is allowed to be an attesting witness, the very object of attestation, namely, the prevention of fraudulent malpractice, may be completely defeated. The principle upon which the rule is based was clearly set forth in the case of *Amick v. Woodworth* (3): "the true reason of the disqualification is that to permit a grantee to attest as a witness the execution of an instrument made to himself, or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would be against public policy, and practically defeat the real purpose of the law, which is to prevent the perpetration of frauds on grantors, and afford reasonable assurance to those who deal with, or on the faith of, such instruments that they are genuine and represent *bonâ fide* transactions." This view was emphasised in the case of *Donovan v. Saint Anthony Co.* (4), where it was observed that, if the contrary view were maintained, the provisions of a statute requiring the execution of a mortgage to be attested by two witnesses might be nullified, and as illustration it was observed that "a mortgage may be given by two persons to a third; the mortgagee may attest and the mortgagors one for the other; then, a person may give one mortgage to two persons; these two may furnish the attestation; an interpretation of the statute, which renders such

(1) (1865) L. R. 1 Eq. 17, 24.

(2) (1881) 7 Q. B. D. 516, 519.

(3) (1901) 58 Ohio 86.

(4) (1899) 8 N. D. 585; 73 Am. St. Rep. 779; 46 L. R. A. 721.

a contingency possible, is clearly inadmissible, because there would be no guarantee of the *bonâ fides* of the transactions." This line of reasoning appears to us to be based on good sense, and is consistent with the principles of justice, equity and good conscience, according to which our Courts are bound to decide. We must, therefore, overrule the first ground taken on behalf of the respondents.

As regards the second branch of the contention of the respondents, its validity has to be determined by reference to the true meaning of the term attestation. As pointed out by this Court in the case of *Sasi Bhusan Pal v. Chandra Peshkar* (1), the term attestation is not defined in the Transfer of Property Act, but there can be no doubt as to what it means. The case of *Freshfield v. Reed* (2), to which we have just referred, is an authority for the proposition that when an instrument is required to be attested, the meaning is that a witness should be present at its execution and should testify that it has been executed by the proper person. Again, in the case of *Ford v. Kettle* (3), and *Roberts v. Phillips* (4), it was held that to attest an instrument was not merely to subscribe one's name to it as having been present at its execution, but included also essentially the presence, in fact, at its execution of some disinterested person capable of giving evidence as to what took place. These cases contemplate, as the requisite of a good attestation, that the document must have been executed in the presence of an attesting witness, who subscribes his name to the instrument in token of this circumstance. In some cases, however, the rule has been stated in terms which imply that the attesting witness must have seen the executant sign the instrument. Thus in the case of *Body v. Halse* (5), Lord Coleridge, in pronouncing against the validity of an attestation, observed that the witness did not see the appellant sign the claim. Again, in *Luper v. Werks* (6), it was ruled that attestation means that the subscribing witness saw the writing executed, and thereupon signed his

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(1) (1906) I. L. R. 33 Calc. 861 ;

4 C. L. J. 41.

(2) (1842) 9 M. & W. 404.

(3) (1882) 9 Q. B. D. 139.

(4) (1855) 4 E. & B. 450.

(5) [1892] 1 Q. B. 203.

(6) (1890) 19 Oreg. 122 ; 23 Pac. 850.

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name as witness. Preponderance of judicial opinion, however, is in favour of the view that an attesting witness is a person in whose presence the instrument is executed. Thus Sweet in his Law Dictionary states that, when A executes a deed in the presence of B, and B signs his name on the document as a token of his having witnessed A's execution, B is said to attest the execution. The Standard Dictionary defines attestation to be the subscription by a person of his name to a written instrument, to signify that the same was executed in his presence. In the Oxford Dictionary (Vol. I, page 551) a similar definition is given, and reference is made to the statement of Blackstone (Commentaries, Volume 2, page 307), that the last requisite to the validity of a deed is the attestation or execution of it in the presence of witnesses. If, then, we adopt this definition, the question arises, when may an instrument be deemed to have been executed in the presence of a witness? Reference may, in this connection, be made to the principles which have been recognized in cases of attestation of wills which are required in England to be attested by witnesses in the presence of the testator. No useful purpose, however, would be served by a minute examination of the cases on the subject which are not directly in point and are not always easy to reconcile. It may be generally stated, as the result of the decisions, that presence involves two ideas—namely, mental cognition of the act, and physical contiguity; in other words, the person in whose presence the act is done must be able mentally to know what is being done, and what is done in the presence of a person, must take place in physical proximity to him, though it is impossible to lay down any inflexible rule as to what degree of proximity is essential. This may be illustrated by a reference to three leading decisions on the subject, which will show to what extent judicial decisions have gone. In one of the earliest cases on the subject, *Casson v. Dade* (1), it was held that where the testatrix sat in her carriage, opposite to the window of the attorney's office in which the will was attested, the attestation was valid, because the testatrix might see the witnesses through

(1) (1781) 1 Brown C. C. 99.

the windows of her carriage and of the office. Again, in *Newton v. Clarke* (1), a testator intending to execute a codicil, signed the same while lying in bed, there being present in the room the two witnesses who attested the codicil, the curtains at the foot of the bed were, however, drawn at the time to screen the testator from the fireplace; the result was, that one of the witnesses could not actually see the testator sign his name, nor could the testator see that witness subscribe the codicil as attesting it. Sir Herbert Jenner held that the codicil was validly attested, as the testator and the witness signed their names in the presence of each other. In the case of *Re Piercy* (2), Sir H. Jenner Fust expressed the opinion that he would be prepared to hold, if necessary, that where the testator is blind, the witnesses may be said to have attested in his presence, provided the positions of the witnesses be such that the testator, if he had had his eyesight, might have been able to see them sign. The principle deducible from these cases clearly supports the view that where, as here, according to the custom of the country, *purdanashin* ladies are unable to appear before male witnesses, a document which, by independent testimony, is conclusively proved to have been executed by a *purdanashin* lady, may reasonably be deemed to have been attested by witnesses who were present outside the *purdah*, and who, before attestation, satisfied themselves that there was no fraud, and that the document had been actually executed by the lady screened off from their gaze. This is the view which was adopted by Brett J. in the case of *Harmongal Narain Singh v. Ganaur Singh* (3), and by Stephen and Chatterjee JJ. in *Isri Prosad v. Rai Gunga Prosad Singh Bahadur* (4). These decisions are based not merely on grounds of convenience, but on a sound principle analogous to that recognized in the case of execution of wills. In this view, it becomes unnecessary for us to pronounce any opinion upon the question of the validity of attestation by a witness who is not

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(1) (1839) 2 Curt. 320.

(2) (1845) 1 Rob. 278;

4 Notes of Cases 250.

(3) (1907) 13 C. W. N. 40.

(4) (1909) 14 C. W. N. 155.

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present at the execution, but subscribes his name subsequently on the strength of an acknowledgment by the executant. There is considerable divergence of judicial opinion upon this point, as is indicated by the cases discussed at the Bar in the course of the argument ; it may further be pointed out that the Madras High Court has recently adopted the Calcutta view in *Shamu Patter v. Abdul Kadir* (1), and in Bombay also, where the opposite view had been adopted, there is a tendency to revert to the Calcutta view : *Ranu v. Laxman* (2) referring to *Burdett v. Spilsbury* (3). We may further point out that, as suggested by the respondents, under certain circumstances a grantee may be estopped to claim that his deed is invalid because it is not duly attested (Jones on Real Property, Volume II, Section 1089) : it is not necessary, however, to deal with this aspect of the case, because, in our opinion, the two mortgage-deeds executed by the second defendant jointly with her sister were duly attested. The first ground upon which the decision of the Subordinate Judge is assailed must consequently be overruled.

The second ground urged on behalf of the appellant is to the effect that the mortgage deeds are not proved to have been executed by her under such circumstances as would make them binding upon a *purdanashin* lady, that she had no independent advice, and that the effect of the provisions as to compound interest was not explained to her. In support of this position, reliance has been placed upon the case of *Shambati Koeri v. Jago Bibi* (4). In our opinion, there is no substance in this contention. No doubt, as has been repeatedly ruled by the Judicial Committee in the case of deeds and powers executed by *purdanashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to, and understood by, those who executed them ; in other words, the Court should be careful to see that deeds taken from *purdanashin* women have been fairly taken, and that parties executing them have been free agents and have been duly informed of what they were about. Judged in the light of these

(1) (1908) I. L. R. 31 Mad. 215.

(3) (1843) 10 Cl. & Fin. 340.

(2) (1908) 10 Bom. L. R. 943.

(4) (1902) I. L. R. 29 Calc. 749

principles, the present case is, in our opinion, not open to successful attack. The evidence is conclusive that the solicitor, Jotindra Nath Bose, read over and explained the document to the lady, the terms of which, it may be observed, were simple and easy of comprehension. She had the advice of her eldest sister who joined her in the transaction, and the husband of the eldest sister looked after the matter for the benefit of both. The money was paid into the hands of the ladies, and was urgently needed to meet the expenses of the litigation then pending in respect of the estate of their father. Under these circumstances, it is impossible to hold that the mortgage deeds which had been properly executed, and to which the consent of the appellant had been deliberately given, could be set aside. The second contention of the appellant is, therefore, groundless and cannot be sustained.

The third ground raises the question of limitation and does not demand elaborate examination, as there is really no substance in it. In so far as a decree for sale of the mortgaged properties is concerned, no question of limitation obviously arises, but a question of limitation does arise in respect of the claim for a personal decree against the mortgagors. The plaintiff relies upon section 20 of the Limitation Act of 1877, and alleges two payments on account of interest within a period of six years antecedent to the suit. That the payments were actually made is conclusively proved by the evidence. The only question which requires consideration is whether the payments were made by an agent of the appellant, duly authorised in this behalf. Now the payments were made by Prince Mookim, the husband of the first defendant; and having regard to the position of the two sisters at the time when the payments were made, we have no doubt that the Subordinate Judge was right in his conclusion that Prince Mookim, holding as he did a power of attorney from both, was the agent of both the ladies. The attempt made by the appellant to establish that her sister at the time was hostile to her, and acted in a way inimical to her interests, has completely failed. The third ground, therefore, cannot be sustained.

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The fourth ground raises a question as to the form of the decree which directs the second and third mortgagees to be paid out of the surplus of the sale-proceeds realised in execution of the decree obtained by the first mortgagee. In view of the decision of this Court in *Mackintosh v. Watkins* (1), the objection must be treated as groundless. No doubt if the amount due to the first mortgagee is paid, there will be no sale of the mortgaged properties, and the second and third mortgagees will consequently obtain no relief in this suit. If, on the other hand, the amount due to the first mortgagee is not paid within the period allowed by the decree, the property will be sold, and no good reason has been suggested why, after the claim of the first mortgagee is satisfied, the second and third mortgagees should not be paid out of the surplus sale-proceeds; there is thus no substance in the fourth ground, which must, therefore, be overruled.

The result is, that the decree made by the Court below is affirmed, and this appeal dismissed with costs.

Appeal dismissed.

S. C. G.

(1) (1904) 1 C. L. J. 31.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

MAHARAJ MANDAL

v.

POKAR SINGH.*

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March 17.

Ferry—Private and public ferries—Maintaining a private ferry within two miles from the limits of a public ferry—Limits not declared by the Local Government—Bengal Ferries Act (Beng. I of 1885) ss. 6, 16, 28.

When the limits of a public ferry have not been declared by the Local Government under section 6 of the Bengal Ferries Act, 1885, a conviction under sections 16 and 28 thereof for maintaining a private ferry, without sanction, to or from any point within two miles of the public ferry, is bad.

THE petitioners, Maharaj Mandal and Rangmahal Das, were placed on trial with another before B. K. Roy, Deputy Magistrate of Purneah, charged under sections 16 and 28 of the Bengal Ferries Act (Beng. I of 1885), and were convicted thereunder, on the 29th January 1909, and sentenced to a fine of Rs. 25 each. The complainant, Pokar Singh, was the agent of one Jugal Pershad, the lessee of a Government or public ferry known as the *Karagola* ferry, plying in the river Ganges between the districts of Bhagalpore and Purneah. The petitioners worked the *Kantanagore* ferry, a private ferry belonging to the Maharaja of Darbhanga. There was nothing on the record to show that the limits of the public ferry had been declared by the Local Government under section 6 of the Act. The Magistrate found that the distances between the landing ghats of the two ferries on the Purneah side were roughly about 1·8 miles, and on the Bhagalpore side about 1·4 miles. He convicted the petitioners as stated above, and further directed them to remove their ferry beyond a distance of two miles of the *Karagola* ferry, on both banks of the river, within 15 days from the date of the order. The petitioners appealed, but their

* Criminal Revision No. 125 of 1910, against the order of F. S. Hamilton, Sessions Judge of Purneah, dated June 28, 1909.

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appeal was dismissed by the Sessions Judge of Purneah on the 28th June. They then obtained the present Rule from the High Court.

Babu Jogendra Nath Mookerjee, for the petitioners.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

STEPHEN AND CARNDUFF, JJ. The petitioners in this case have been convicted of an offence under section 28 of the Bengal Ferries Act, 1885. We have granted a rule on the Magistrate of the Purneah District to show cause why the conviction and the sentences passed on the petitioners should not be set aside on the ground that the limits of the public ferry have not been declared under section 6 of the Act. It appears that this is the fact of the case. There is nothing to show that the *Karagola* ferry has ever been declared to be a public ferry under section 6, or, at least, the declaration itself has not been produced. The Judge tells us that the *Karagola* ferry certainly is a public ferry and has existed for over 35 years, and, from what is said in the explanation, we gather that the point was not raised at the trial. At the same time the *Karagola* ferry has apparently not been declared under section 6, and, therefore, the limits within which the rights connected with it exist, have not been, and cannot be, ascertained.

Under these circumstances we consider that the conviction cannot stand. We accordingly make the rule absolute and set aside the conviction. Any money paid in respect of the fines imposed will be refunded.

Rule absolute.

CRIMINAL REVISION.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Woodroffe.

NARAIN CHANDRA CHATTERJEE

v.

CORPORATION OF CALCUTTA.*

1909
Nov. 17.

Prosecution—Calcutta Municipal Act (Beng. III of 1899) ss. 559 (18), 561 (b), 631—Noncompliance with notice to remove encroachment on public street—Institution of prosecution more than three months after expiry of notice—Limitation—Continuing offence—Bye-laws, validity of—Ultra vires.

A prosecution for failure to comply with a notice by the Chairman to remove an obstruction on a public street, instituted more than three months after the expiry of the date fixed therein, is barred under s. 631 of the Calcutta Municipal Act.

A Bye-law must conform to the provisions of the law under which it purports to be made.

Rule (1) of the Bye-laws framed under s. 559 (18) of the Act is *ultra vires*, in so far as it creates a continuing breach after notice in violation of the terms of s. 561 (b).

THE petitioner is the owner of premises No. 31-2, Bagh Bazar Street in the town of Calcutta. A narrow strip of land, about 10 inches wide, runs along the foot-path, and is claimed by the petitioner as part of his land and by the Corporation as included in the public street. The petitioner erected two masonry pillars on the disputed piece of land some time ago. On the 3rd August 1908 a notice was served on him by the Chairman directing him to remove the obstruction within seven days. Thereupon some correspondence passed between the petitioner and the Chairman, and the former having ultimately failed to comply with the requisition, a District Building-Surveyor filed a complaint against him, on the 8th February 1909, in respect of the same, under rule (1) of the Bye-laws made under section 559 (18) of the Act, which runs as follows :—

“When any person has, whether before or after the passing of these bye-laws, placed or allowed to be placed any . . . other masonry or brick-work

* Criminal Revision No. 1053 of 1909, against the order of Amrita Lal Mookerjee, Municipal Magistrate of Calcutta, dated July 5, 1909.

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erection or any structure, in such a position as to cause a projection, encroachment, or obstruction over or on any public street the Chairman may, by written notice, require the owner or the person who has erected such . . . erection or structure to remove the same within a reasonable time, and any person who fails to comply with the terms of such notice shall be liable to a daily fine which may extend to Rs. 10 *per diem* for every day after the expiry of the time specified in the notice."

The petitioner was convicted on the 5th July and fined Rs. 5 by the Municipal Magistrate. He thereupon moved the High Court against the conviction and sentence and obtained the present Rule.

Babu Narendra Kumar Bose, for the petitioner.

Babu Debendra Chandra Mallik, for the Municipal Corporation.

JENKINS C.J. In this case a Rule has been issued calling on the Municipal Magistrate of Calcutta to show cause why the order of conviction of the petitioner should not be set aside on the ground that the learned Magistrate ought to have held that the prosecution was barred under section 631 of the Calcutta Municipal Act. The facts are briefly these. It has been found by the Municipal Magistrate that two pillars have been placed by the petitioner in such a position as to cause an encroachment on a public street. On the 3rd of August 1908, the Chairman of the Municipality by a written notice called on the petitioner to remove this obstruction within seven days. He purported to act under one of the Municipal bye-laws, which deal with obstructions and encroachments. The notice was not obeyed, and, on the 8th of February 1909, these proceedings were commenced with the result that the Magistrate held an offence for breach of the bye-law to be established, and fined the petitioner Rs. 5. In these circumstances the present Rule has been issued.

It is provided by section 631 of the Calcutta Municipal Act that "No person shall be liable to punishment for any offence against this Act, or any rule, bye-law, or regulation made hereunder, unless complaint of such offence is made before a Magistrate within three months next after the commission of such

offence." Here the complaint was made more than three months after the expiration of the period limited in the notice for the removal of the obstruction. It is conceded before us that the section I have just read would be a bar unless it can be established that the Bye-law No. 1 relating to obstructions and encroachments created a continuing offence applicable to the circumstances of the case. But it is contended by Mr. Mallik, who has argued this case ably on behalf of the Municipality, that the bye-law does in fact create a continuing offence, and, therefore, the bar indicated in section 631 has no application. But a bye-law must conform with the provisions of the enactment under which it purports to be made, and this particular bye-law, which we are now considering, is said to be sanctioned by section 559, clause (18) of the Calcutta Municipal Act of 1899. It may be conceded that, so far as it relates to obstructions, it comes within the provisions of clause (18) of section 559, except, perhaps, so far as it purports to deal with obstructions whether before or after the passing of the bye-laws. But that is a matter on which we need pronounce no opinion now. The question is whether it creates a continuing offence in the manner authorized by section 561 (b) of the Act. Clause (a) of this section can admittedly be left out of consideration, for it is of no assistance for the purpose of this case, and the section without clause (a) reads as follows: "In making a bye-law under section 559, the General Committee may provide that a breach of it shall be punishable with fine which may extend to ten rupees for every day during which the breach continues after receipt of written notice from the Chairman to discontinue the breach." Therefore, the section only authorizes the penalty for the continuance of a breach where notice follows the breach. Returning to the bye-law, we find that the penalty is attached to a breach which only arises after the notice, and that there is no provision for any subsequent notice which would come within the provisions of section 561 requiring that there should be notice after breach. Therefore, the bye-law purports to create a continuing breach which is outside of, and fails to comply with, the provisions of section 561, clause (b). It follows

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from this that there is no provision for a continuing breach that could, even on the argument of the Municipality, take the case outside the provisions of section 631.

Had the bye-law been correctly framed, it would have been a question whether limitation would not run from the time when the offence was first committed, for it is to be noticed that the words of the section are that the complaint must be made within three months next after the commission of such offence. There are authorities which bear on that point, but the question does not arise in the view I take of this case, and I therefore do no more now than guard myself against being taken to accede to the argument that has been addressed to us on that point. The result is that, in my opinion, the Rule must be made absolute, and the order of conviction set aside. The fine, if paid, must be refunded.

WOODROFFE J. I agree.

E. H. M.

Rule absolute.

CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

PARMANAND DAS

v.

KRIPASINDHU ROY *

Practice—Decree, modification of the terms of, after appeal—Jurisdiction—Appellate Court, powers of—Civil Procedure Code (Act V of 1908) s. 148.

Section 148 of the Civil Procedure Code, 1908, cannot be taken to give any Court power to interfere with or modify its decree after there has been an appeal filed against the decree. The only Court that could, after an appeal had been preferred, modify the terms of the decree, or extend the time fixed in the decree for its execution, or suspend the order made in the decree, would be the Appellate Court.

RULE granted to Mohant Parmanand Das Gossain and others, decree-holders.

* Civil Rule No. 3009 of 1909, against the order of J. N. Mookerjee, Subordinate Judge of Cuttack, dated June, 1, 1909.

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Mohant Parmanand Das Gossain and others obtained a decree in the Court of the Subordinate Judge of Cuttack for the execution of a *kabuliyat* against Kripasindhu Roy as *sarbarakar* in their favour within two months from the date of the decree. The defendant appealed to the High Court and, on the 20th May 1909, within the two months limited by the decree, he applied to the High Court for an order to stay, pending the hearing of the appeal, the order directing the execution of the *kabuliyat*. The High Court ordered that the application should be put up at the time of disposal of the appeal. Thereafter, on the 1st June 1909, the defendant applied to the Court of the Subordinate Judge of Cuttack for an order extending the period of two months fixed in the decree for the execution of the *kabuliyat* by him in favour of the plaintiff, and obtained such extension of time from that Court. The plaintiffs, thereupon, moved the High Court and obtained this rule against the defendant, Kripasindhu Roy, to show cause why the order of the Subordinate Judge granting the extension of time for the execution of the *kabuliyat* should not be set aside.

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Babu Sarat Chandra Roy Chowdhry, for the petitioners.

Babu Girish Chandra Pal, for the opposite party.

BRETT AND SHARFUDDIN JJ. The present rule was obtained by the petitioners, the plaintiffs, against the defendant No. 1, who was the judgment-debtor in a suit before the Subordinate Judge of Cuttack, to show cause why the order obtained by the defendant No. 1 in that suit from the Subordinate Judge, on the 1st June 1909, extending the period fixed in the decree for the execution of a *kabuliyat* by him in favour of the petitioners, the decree-holders in that suit, beyond the period stated in the decree, should not be set aside.

It appears that by the decree, the present opposite party, who was the defendant No. 1 in suit No. 404 of 1907 in the Court of the Subordinate Judge of Cuttack, was directed to execute a *kabuliyat* as *sarbarakar* in favour of the plaintiffs, decree-holders, within two months from the date of the decree.

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The opposite party, the judgment-debtor, appealed to this Court, and within the two months limited by the decree, he put in an application to this Court, on the 20th May 1909, praying for an order to stay, pending the hearing of the appeal, the order of the Subordinate Judge passed in the decree directing him to execute the *kabuliyat* within two months from the date of the decree, or that this Court should pass such other order as to it might seem proper. The only order passed by this Court on that application was that the application should be put up when the appeal was disposed of. That order was dated the 20th May 1909. The opposite party, the judgment-debtor, then seems to have gone back to the Court of the Subordinate Judge of Cuttack, and, on the 1st of June 1909, obtained the order in respect of which the present rule has been issued.

In support of the rule, it is contended that, after the appeal had been filed, the Subordinate Judge had no power, under the law, to modify his decree or to extend the period fixed in the decree for the execution of the *kabuliyat* by the judgment-debtor. It is not clear under what provision of the law the order was passed by the Subordinate Judge; but it is suggested that it might have been passed under section 148 of the new Code of Civil Procedure. On behalf of the petitioners it has, however, been contended that section 148 cannot be taken to give to any Court power to interfere with or modify its decree after there has been an appeal filed against the decree, and we think that this contention is sound. The only Court that could, after an appeal had been preferred, modify the terms of the decree or extend the time fixed in the decree for its execution, or suspend the order made in the decree would, in our opinion, be this Court as the Appellate Court. We think, therefore, that this rule must be made absolute, and the order passed by the Subordinate Judge on the 1st June 1909 must be set aside, on the ground that he had no jurisdiction under the law to pass it.

The question then remains whether this Court should take any action now on the application which was made to it on the 20th of May 1909, or whether we are precluded from taking

any action by the order passed by another Division Bench, to the effect that the application be put up when the appeal has been disposed of. In our opinion, the previous order made by the Division Bench does not dispose of the application, but merely postpones the date for its disposal, and we think that there is nothing to prevent us from dealing with that application if, in our opinion, the circumstances of the case render it necessary that we should do so. We think that this is a case in which the circumstances are such that some order on the application of the judgment-debtor, the defendant No. 1, should be passed now, and not be postponed until the appeal is disposed of. The judgment-debtor certainly might be placed in a very unfortunate position if, after the disposal of the appeal, the Court was to hold that it should confirm the decision of the Court of first instance that the defendant No. 1 was the *sarbarakar*, and then, refusing to extend the period during which he was directed by the Court to execute the *kabuliyat*, was to decide that he had forfeited his right under the decree to execute such *kabuliyat*. We think, therefore, that the best course for us now to adopt is to direct on that application that a rule be issued on the opposite party to show cause, within one week from this date, why that portion of the decree of the Subordinate Judge against the judgment-debtor should not be suspended on such terms as to this Court may seem fit until the appeal in this Court is disposed of. The petitioners in this rule are entitled to their costs, but, in the circumstances, we think that they should only be nominal.

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Rule absolute.

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APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Doss.

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SHELLEY BONNERJEE

v.

RAJ CHANDRA DATTA.*

*Interpleader—Landlord and Tenant—Civil Procedure Code (XIV of 1882)
ss. 470, 471, 474, 578—Bengal Tenancy Act (VIII of 1885) s. 149.*

An interpleader suit, with a prayer for declaration of the titles of the several sets of defendants in the disputed land, by the tenant against the landlords in whose favour he has executed separate *kabuliyats*, is not maintainable.

SECOND APPEAL on behalf of the defendants by the Receiver appointed by the High Court.

The plaintiff in the suit, out of which this appeal arose, was originally the *raiyat* of all the nine plots of land to which the suit related. The lands were situated in Jowar Abdullapur, within the revenue-paying estate Gangamandal. Defendant No. 1, Mr. Shelley Bonnerjee, was the receiver appointed by the High Court and placed in charge of the estate. Defendant No. 2, who was the owner of the estate to the extent of 4 annas, partly on his own account and partly as administrator to the estate of his deceased brother, was, at the time of the suit, the *ijaradar* of the *khas* lands of the estate under the receiver. Defendant No. 8 was then the *dar-ijaradar* of 2 annas of Jowar Abdullapur under defendant No. 2, and the lands in suit were claimed as appertaining to that share. Defendants Nos. 3 to 6 were the owners of an ancestral *taluk*, by name Ram Ganga, and of an ancestral *miras* tenure of the lands of the *lakheraj* estate within Jowar Abdullapur, known as Bholanath Bhattacharji. Defendant No. 7 was the owner of *miras* rights in plot No. 1 of the lands created in his favour

* Appeal from Appellate Decree, No. 2266 of 1907, against the decree of Ram Charan Mallik, Subordinate Judge of Comillah, dated July 15, 1907, affirming the decree of Mohendra Nath Das, Munsif of Comillah, dated Jan 31, 1906.

by the father of defendants Nos. 3 to 6, as owner of *taluk* Ram Ganga, towards the latter end of 1290. Madhab Aditya, who was the *dar-ijaradar* and *kat-ijaradar* of the *khas* lands of the estate within Jowar Abdullapur from 1270 to 1290, according to the plaintiff's case, realized rents from him during that period in respect of all the nine plots of land in suit. After the expiry of the term of his *dar-ijara*, he granted a *kaimi-miras* of plots Nos. 2 and 3 of the lands in suit to the plaintiff, describing the lands as appertaining to *taluk* Ram Ganga, and another *kaimi-miras* of plots Nos. 4 to 7, describing the latter as appertaining to the *lakheraj* estate Bholanath. From that time the plaintiff was paying rent in respect of plot No. 1 to defendant No. 7, and in respect of plots Nos. 4 to 7 to Madhab Aditya and his heirs (defendants Nos. 3 to 6) as owners of *taluk* Ram Ganga and of the *miras* tenure within the *lakheraj* estate Bholanath Bhattacharji. One Sani Mahomed, who was the *dar-ijaradar* of the *khas* lands of Gangamandal within Jowar Abdullapur from 1291, sued the plaintiff for rents in respect of plots Nos. 2 to 9, but his suit was dismissed so far as plots Nos. 2 to 7 were concerned, and was decreed in respect of plots Nos. 8 and 9 only. Subsequently, in 1299, the officers of defendant No. 2 took a *kabuliyat* from the plaintiff in respect of all the nine plots of lands. From that time the plaintiff had to pay rents in respect of the lands in suit to defendant No. 2 and the *dar-ijaradar* under him, and also to defendants Nos. 3 to 7. Under the circumstances, the plaintiff brought the suit and prayed that the title of the different sets of defendants might be declared, so as to relieve him of liability to pay rents twice over in respect of the lands in suit.

Defendants Nos. 1 and 2 contended, *inter alia*, that the suit was not maintainable in the form in which it was brought.

The Court of first instance dismissed the suit as not maintainable. On appeal, the finding on the question of the maintainability of the suit was set aside and the case remanded for trial on the merits. On remand, the learned Munsif held that the suit was not barred by limitation or *res judicata*, and declared which plots were comprised in what *taluk*. On appeal,

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the learned Subordinate Judge upheld the findings of the Court below.

The defendants, thereupon, appealed to the High Court.

Babu Prabhashchandra Mitra (with him *Babu Umakali Mukherji*), for the appellant. The plaint in the present case contravenes the provisions of section 474 of the Civil Procedure Code. The elements of section 474 are all present. I also rely on section 471. *Koylash Chandra Dutt v. Goluk Chunder Poddar* (1) supports me.

Babu Umakali Mukherji, for the appellant [appeared at this stage and was allowed to follow]. The plaintiff was not prejudiced in any way. He could have taken advantage of section 149 of the Bengal Tenancy Act. It is true the point we are now seeking to raise was decided against us by the first appellate Court, and there was a remand. It is, however, a pure point of law and we can raise it now.

Babu Gobindachandra De Roy, for the respondent. Upon the facts found and admitted, a bill of interpleader is sustainable in law. Section 474 does not prohibit such a suit. The rule that a tenant cannot compel his landlord to interplead has an exception, as in section 474 itself. The present case falls within that exception: *Clarke v. Byne* (2).

There was no appeal by the appellant against the order of remand, and considering the turn the case has taken, he should not be allowed to raise the point now. The appellant must, moreover, show that there has been injustice in the case to have the interference of Court: *Mohesh Chandra Dass v. Jamiruddin Mollah* (3), *Mallikarjuna v. Pathaneni* (4), *Durga Kinkar Norha v. Konchai Ronza* (5), *Madhu Sudan Sen v. Kamini Kanta Sen* (6), *Baikuntha Nath Dey v. Nawab Salimulla Bahadur* (7), *Matra Mondal v. Hari Mohun Mullick* (8), *Nowcowerree Mundul v. Mookta Bibee* (9). *Nussurooddeen Hossein Chowdhry*

(1) (1897) 2 C. W. N. 61.

(2) (1897) 13 Ves. 383.

(3) (1901) I. L. R. 28 Calc. 324.

(4) (1894) I. L. R. 19 Mad. 479.

(5) (1904) 5 C. L. J. 71.

(6) (1905) 9 C. W. N. 895.

(7) (1907) 12 C. W. N. 590.

(8) (1889) I. L. R. 17 Calc. 155.

(9) (1865) 2 W. R. 181.

v. *Lall Mahomed Puramanick* (1), and *Gunga Monee Dossee v. Issur Chunder Shaha* (2). Section 474 only lays down a rule of procedure. Even if there has been a defect or error in the frame of the suit or in the order of remand, section 578 of the Civil Procedure Code would cure it.

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[JENKINS C.J. But if the suit itself be unsustainable, it would raise a question of jurisdiction.]

But no question of jurisdiction can arise if the Court had pecuniary and local jurisdiction, and also jurisdiction over the subject-matter: *Matra Mondal v. Hari Mohun Mullick* (3) and *Mohesh Chandra Dass v. Jamiruddin Mollah* (4). Moreover, the ground of unsustainability raised in this case is not of jurisdiction. The suit may, moreover, be treated as a suit for declaration as regards the *kabuliyats* and other matters. If defendants Nos. 3 to 6 were wrongly impleaded, they may be treated as unnecessary parties. A misjoinder of parties under such circumstances cannot defeat the suit: see section 99 of the new Code. As regards defendants Nos. 7 and 8, an interpleader suit is not improperly constituted, merely because one or two of the defendants do not claim the whole of the subject-matter. The case cited by the appellant is clearly distinguishable.

Babu Umakali Mukherji, in reply. Section 578 cannot have any application, as the question affects the merits of the case and in fact goes to the very root of it.

Cur. adv. vult.

JENKINS C.J. This case comes before us by way of second appeal, and it arises out of a suit which has the appearance of an interpleader proceeding. The plaintiff is the tenant of the lands to which the suit relates, and the defendants may be divided into two groups—on the one side being ranged defendants Nos. 1, 2 and 8, whom I will for brevity call the Shovabazar party, and on the other side defendants Nos. 3 to 7, whom I will describe for brevity as the Chaudhuri party. The plaintiff's grievance is that having, as he says, passed two

(1) (1870) 13 W. R. 234.

(2) (1872) 17 W. R. 465.

(3) (1889) I. L. R. 17 Calc. 155.

(4) (1901) I. L. R. 28 Calc. 324.

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kabuliyats, one in favour of the Shovabazar party and the other in favour of the Chaudhuri party, he finds himself in this predicament of being sued on both. This he considers gave him title to come to the Court, and he has brought this suit praying "that the Court may be pleased to declare which defendant has what right in which of the disputed lands, and in what right the plaintiff holds which of the said lands, under whom, and for what amount of rent the plaintiff is liable to which defendant, for which land, and to declare that one of the two parties claiming the rent of the said lands is not entitled to the same"—a somewhat comprehensive and complicated prayer for an interpleader. There are further prayers which may be regarded as the sequel of that which I have read. The Munsif, before whom the case came in the first instance, dismissed the suit as not being maintainable. His decree was reversed on appeal by the Subordinate Judge and a remand was directed. Unfortunately, the present appellants did not at that time prefer an appeal, and so the case went back to the Munsif. There was an investigation before him resulting in a decree, of which the defendant No. 1, as the mouthpiece of the Shovabazar party, complains. This decree was on appeal affirmed by the Subordinate Judge, and it is from that decree of affirmation that the present second appeal is preferred.

Two points only are raised on this appeal. *First*, it is said that the Courts below should have held that the suit was barred by the provisions of section 474 of the Civil Procedure Code of 1882, and should have dismissed the suit; *secondly*, that the Courts below should have held that the plaintiff's suit was barred by the principle of *res judicata*. The plaintiff endeavours to support the decree in his favour by reference to section 474 of the Civil Procedure Code, and he in effect concedes that unless he can establish to our satisfaction that this suit is sanctioned by section 474, Civil Procedure Code, it is misconceived. Section 474 is only one of several contained in Chapter XXXIII, which lays down the law as to interpleader. Section 470 provides that "when two or more persons claim adversely to one another the same payment or property from another person,

whose only interest therein is that of a mere stake-holder and who is ready to render it to the right owner, such stake-holder may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to whom the payment or property should be made or delivered, and of obtaining indemnity for himself: Provided that, if any suit is pending in which the rights of all parties can properly be decided, the stake-holder shall not institute a suit of interpleader." Then section 471 lays down what are the requisites of a plaint in such a suit. It provides that the plaint must state "(a) that the plaintiff has no interest in the thing claimed otherwise than as a mere stake-holder; (b) the claims made by the defendants severally; and (c) that there is no collusion between the plaintiff and any of the defendants." Then it is provided in section 472 that "when the thing claimed is capable of being paid into Court or placed into the custody of the Court, the plaintiff must so pay or place it before he can be entitled to any order in the suit." The prayer of this suit seeks a declaration as to the title to land, and if this land is to be regarded as the property that was in dispute, I fail to see how the plaintiff can describe himself as a mere stake-holder of the property, and indeed in view of that obstacle in his way the learned pleader for the plaintiff has, in the course of his argument before us, urged that the interpleader relates to the rent payable under the *kabuliyat*. But there again we are confronted with the difficulty that there are two *kabuliyats* and not one *kabuliyat*, and the amount secured by each is different from that payable under the other, so that I fail to see how it can be said that we have the predicament of two or more persons claiming adversely to one another the same payment or money; and without elaborating the matter further, it appears to me that the case manifestly does not come within the positive provisions of Chapter XXXIII, and that section 474 is clear in its terms against the plaintiff. On the facts placed before us, it is impossible to hold that the rival parties, when their positions in relation to these claims are precisely defined, claim the one through the other. If the plaintiff finds himself harassed in

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the way he describes, it may be that he can take advantage of the protective procedure prescribed by section 149 of the Bengal Tenancy Act, though as to this I can express no definite opinion on the present materials. But be this as it may, the suit which he has brought is not properly maintainable. It has been urged that, having regard to the provisions of section 578 of the Civil Procedure Code of 1882, no advantage can be taken against him of that fact; having regard to the course this case has taken. I cannot agree with that view of the section or of the case that the plaintiff has cited to us as the most potent in his favour, that is to say, the decision in *Mohesh Chandra Dass v. Jamiruddin Mollah* (1). There is nothing in that case, nor, in my opinion, is there anything in the section, which sanctions the view that the appellant has lost his right of appeal to the High Court after remand.

The result then is that, in my opinion, the appeal must be allowed and the suit must be dismissed.

The appellant will get his costs of this appeal and also the costs throughout other than those subsequent to the remand.

Doss J. I agree.

Appeals allowed.

S. M.

(1) (1901) L. L. R. 28 Calc. 324.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

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Revenue Sale—Incumbrance or under-tenure, how avoided, and when—Mesne profits—Liability of several classes of tenure-holders—Damages.

An incumbrance or under-tenure is not *ipso facto* avoided by the sale of an estate for arrears of revenue, and is only liable to be avoided at the option of the purchaser at such sale.

Titu Bibi v. Mohesh Chunder Bagchi (1) followed.

The law does not require any notice as a necessary preliminary to a suit to avoid an under-tenure, but the option of the purchaser may be exercised by the institution of a suit within the time approved by law. Where such a suit has been instituted, the tenure must be regarded annulled from the date of the commencement of the suit.

For the period antecedent to a suit for annulment of an incumbrance, the possession of the under-tenure-holder is not wrongful, and purchasers at the revenue sale are not entitled to claim by way of damages for use and occupation any sum in excess of what actually represents the rent payable by the tenure-holder of the first degree.

A decree for rent in such a case can be made only against such of the defendants as held the tenures directly under the defaulting proprietors, and not against all of them jointly and severally.

In respect of mesne profits which accrue during the pendency of a suit for possession, the liability of different tenure-holders of the same degree, and of separate under-tenure-holders of different degrees, should be apportioned according to the share of the profits intercepted by each.

Jotindra Mohun Lahiri v. Guru Prosunno Lahiri (2) referred to.

A release of one joint wrong-doer without any intention to release the other joint tort-feasors, but only as a partial satisfaction, discharges the others only *pro tanto*.

*Appeals from Appellate Orders, Nos. 155 and 548 of 1908, against the order of P. E. Cammiade, District Judge of Backergunge, dated Dec. 23, 1907, and June 3, 1908, respectively, modifying the order of Umanath Ghosal, Subordinate Judge of Barisal, dated July 8, 1907.

(1) (1883) I. L. R. 9 Calc. 683. (2) (1904) I. L. R. 31 Calc. 597;
L. R. 31 I. A. 94.

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Where the plaintiffs release some of the wrong-doers from liability, the claim against the others have been split up by their own conduct, and a joint decree ought not to be passed against all the defendants.

Bissonauth Tewarry v. Koylashbany Narain Singh (1) followed.

APPEALS by Ramratan Kapali and others, the judgment-debtors.

These appeals arose out of proceedings for the assessment of mesne profits following a preliminary decree for *khas* possession passed on the 19th of December 1905.

The plaintiffs in that suit purchased, through a *benamidar*, at a revenue sale, *taluk* No. 1744 in the district of Backergunge. This and four other *taluks* had been owned and possessed by the zemindar by private partition, and there was no means of ascertaining which were the lands belonging to *taluk* No. 1744. The plaintiffs sued for the ascertainment of the lands belonging to their *taluk*, and they obtained a decree for a joint and undivided share of 5 annas 9 *gandas* 2 *karas* 1½ *krantis* of all five *taluks*. Having obtained this decree, the plaintiffs tried to realise rents and were opposed by the defendants, who set up various tenures and under-tenures which they claimed to hold under one of the co-sharer zemindars. They then instituted the suit of which the proceedings for the ascertainment of mesne profits were a part. In the judgment delivered on the 19th of December 1905, the Subordinate Judge of Barisal decided that the plaintiffs were entitled to *khas* possession of their share of the lands covered by the tenures and under-tenures claimed by the defendants, as well as of all the lands of the 5 *mauzas*, and that the defendants "are all liable for mesne profits, except defendants Nos. 145 to 149, who, amongst others, "amicably" settled "the case with the plaintiffs;" the question of the amount of mesne profits was reserved for subsequent trial.

The plaintiffs decree-holders then applied for execution of the decree, and the Subordinate Judge, who tried the execution case, held that the judgment of his predecessor, dated the 19th December, was silent on the subject of the nature of the

defendants' liability, that the question was therefore open to adjudication in the present proceedings for the ascertainment of mesne profits, and that the defendants were equitably entitled to have their liability for mesne profits apportioned according to the extent of occupation and enjoyment of the total lands by each group of tenure-holders subordinate to the *howladars*, who he held would be liable for the whole amount, as their connection extended to the whole of the lands. He further held that the agreement come to between the decree-holders and some of the judgment-debtors, stipulating to discharge the latter from their share of the debt on accepting some money from them, could not be taken as a ground for splitting up the liability of the remaining judgment-debtors, but had only the effect of reducing the judgment-debt by the amount for which the compounding debtors would be found liable. Some of the other judgment-debtors and the decree-holders appealed against the Subordinate Judge's decision in the execution case. In the appeal by the judgment-debtors they contended, *inter alia*, that the agreement with the decree-holders had split up the liability of the several judgment-debtors, and that each one of the judgment-debtors was liable to pay only the amount realized by him.

The decree-holders, on appeal, contended to the effect that the question of the nature of liability of the defendants could not be re-opened in the execution-proceedings, as the judgment of the 19th December 1905 decided the matter fully, and that the judgment-debtors were jointly and severally liable for the entire mesne profits. The District Judge, by his judgment dated the 23rd December 1907, dismissed the appeal of the judgment-debtors partially, and decreed the appeal of the decree-holders, holding that the judgment-debtor appellants were jointly and severally liable for the mesne profits which accrued after the 21st March 1905,—the date of the decree passed by the High Court in the previous suit for *khas* possession,—and that each of them was separately liable for mesne profits which accrued on his or her share previous to that date, and that, so far as the appealing judgment-debtors were

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concerned, no benefit could be legally claimed from the decree-holders' action in compromising with some of the judgment-debtors.

Thereafter, on the decree-holders' application for a review of the judgment of the District Judge, he held by his judgment, dated the 3rd June 1908, that his observation in the previous judgment, to the effect that regarding the period prior to the 21st March 1905 the judgment-debtors' liability would be separate, was not consistent with the ordering portion of the said judgment entirely dismissing the judgment-debtors' appeal, the said observation was rescinded, and it was finally directed by the judgment passed on review on the said 3rd June 1908 that the order of the Subordinate Judge with regard to the apportionment of mesne profits which accrued due before the 21st March 1905 do stand unaltered.

The judgment-debtors filed this second appeal, No. 155, from the appellate order of the District Judge passed on the 23rd December 1907, and appeal No. 548 from original order against the order passed by the District Judge on the 3rd June 1908 in review of his own judgment in the appeal by the decree-holders.

Babu Jogesh Chandra Roy (with him *Babu Prakash Chandra Majumdar* and *Babu Ramesh Chandra Sen*), for the appellants. In assessing liability for mesne profits in such a case, the equitable view would be for separate assessment. Taking also the case-law on this head, it would seem the balance of opinion is in favour of the equitable view: *Fuzul Mahomed Mundul v. Raj Coomaree Debee* (1), *Collector of Bograh v. Shama Shunkur Mojoondar* (2), *Krishna Mohun Basak v. Kunjo Behari Basak* (3), *Bejoy Chand Mohatab v. Lakhinarain Chowdhry* (4). Admittedly, there are cases against this view. The judgment-debtors were holding the lands under a valid title for a long time, and their interests were not at all affected by the sale of *taluk* No. 1744. A sale for arrears of revenue does not *ipso facto*

(1) (1866) 6 W. R. 113.

(2) (1866) 6 W. R. 230.

(3) (1881) 9 C. L. R. I.

(4) (1908) 12 C. W. N. clxviii.

avoid incumbrances and under-tenures, and when the decree-holders gave notice to give up possession of the *howla*, the judgment-debtors were within their rights in refusing to do so. It is only for the period after a decree has been made in a suit for annulment of under-tenures, that the under-tenure-holders or incumbrancers may be held liable for any mesne profits.

I would next contend that release of some of the joint wrong-doers operates as a release of all : *Nicholson v. Revill* (1), *Cocke v. Jennor* (2), *Duck v. Mayeu* (3), *Bissonauth Tewarry v. Koylashbany Narain Singh* (4).

Lastly, I would contend that wrong-doers can claim a right of contribution when the wrong is not a conscious wrong. At all events, credit ought to be given for the amounts received by the decree-holders from some of the defendants : *Burrows v. Rhodes* (5), *Adamson v. Jarvis* (6), *Sreeputty Roy v. Loharam Roy* (7), *Suput Singh v. Imrit Tewari* (8), *Kishna Ram v. Rakmini Sewak Singh* (9), *Hari Saran Maitra v. Jotindra Mohan Lahiri* (10), *Jotindra Mohun Lahiri v. Guru Prosunno Lahiri* (11).

Babu Baikunthanath Das (with him *Babu Gunada Charan Sen*), for the respondents. It is not open to an executing court to go behind the finding in the judgment on which the decree to be executed is based. In this case the clear finding was that all the defendants were liable for mesne profits. The amount only was left to be determined in execution. Section 212 of the Civil Procedure Code limits the enquiry in the execution stage to an ascertainment of the amount, and does not extend it to a decision upon the nature of the liability. Even if the finding in the judgment of the original suit is liable to bear a different construction, it being our case that the defendants all jointly opposed us in collecting rent, and that case

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(1) (1836) 4 Ad. & El. 675;
43 R. R. 460.

(2) (1615) Hob. 66 ; 102 E. R. 214.

(3) [1892] 2 Q. B. 511.

(4) (1863) 2 Hay 297.

(5) [1899] 1 Q. B. 816.

(6) (1827) 4 Bing. 66 ; 29 R.R. 503.

(7) (1867) B. L. R. Sup. 687 ;
7 W. R. 384.

(8) (1880) I. L. R. 5 Calc. 720.

(9) (1887) I. L. R. 9 All. 221.

(10) (1900) 5 C. W. N. 393.

(11) (1904) I. L. R. 31 Calc. 597 ;
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being found to be true, as we read the finding, this Court can dispose of the present question only upon that basis and on no other. The liability must, therefore, be joint and several, the defendants being all tort-feasors: *Ram Chunder Surmah v. Ram Chunder Pal* (1), *Bheekumbur Singh v. Raj Chunder Ghose* (2), *Ganesh Singh v. Ram Raja* (3), *Ajoodhya Doss v. Lalljee Paurey* (4), *Mudun Mohun Singh v. Ram Dass Chuckerbutty* (5), *Mugun Chunder Chutturaj v. Surbessur Chuckerbutty* (6). See also observation of Markby J. in *Fuzul Mahomed Mundul v. Raj Coomaree Debee* (7).

As to the period for which mesne profits are to be assessed, the question is, in the first place, no longer open, having been by clear implication decreed in the original suit for the full period claimed therein. There could at least be no possible doubt that the defendants were wrong-doers from the date of institution of the original suit for *khas* possession, institution of a suit being sufficient notice for setting aside an incumbrance: *Mafizuddin v. Korbadi Ali Chowdhuri* (8), *Kamal Kumari Chowdhurani v. Kiran Chandra Roy* (9) and *Mir Waziruddin v. Lala Deoki Nandan* (10).

The release of some of the judgment-debtors meant only a part satisfaction of the entire debt, and not a full discharge of each and all of the judgment-debtors. The principle of the English cases has never been and should not be followed in this country, and especially so when the agreement entered into between the decree-holders and the judgment-debtors so discharged clearly provides that the result of the payment would be that the decree-holders would not enforce the decree as against them.

Cur. adv. vult.

- (1) (1875) 23 W. R. 226.
- (2) (1871) 15 W. R. 196.
- (3) (1869) 3 B. L. R., P. C., 44;
12 W. R. 38, P. C.
- (4) (1873) 19 W. R. 218.

- (5) (1880) 6 C. L. R. 357.
- (6) (1867) 8 W. R. 479.
- (7) (1866) 6 W. R. 113.
- (8) (1903) I. L. R. 31 Calc. 393.
- (9) (1898) 2 C. W. N. 229.

- (10) (1907) 6 C. L. J. 472

MOOKERJEE AND TEUNON JJ. The substantial question of law which calls for decision in these appeals relates to the assessment of mesne profits of property sold for arrears of revenue, and is of a somewhat novel character. The circumstances under which the claim for mesne profits is made by the decree-holders are not the subject of controversy between the parties. On the 25th of September 1894, the respondents purchased an estate at a sale for arrears of revenue. They at first commenced an action for recovery of possession of some of the lands comprised in the estate, on the allegation that the intermediate tenure set up by the persons in possession was not binding upon them as purchasers at a sale for arrears of revenue. This suit was decreed on the 2nd March 1900, and on appeal to this Court, the decree of the Court of first instance was affirmed on the 24th March 1905. On the 12th April 1905 the purchasers commenced the present action for recovery of possession of lands not comprised in the previous suit, upon the allegation that the intermediate tenures set up by the defendants were either fictitious, or had been created after the date of the Permanent Settlement, and were consequently inoperative against them as purchasers of the entire estate at a revenue sale. The suit was decreed on the 19th December 1905, and it was found that the tenures, though genuine, were not proved to have been in existence at the date of the Permanent Settlement. On the 14th March 1906, the decree-holders obtained delivery of possession, and subsequently, on the 30th July 1906, asked for assessment of mesne profits. The Court below has made a full investigation into the claim, and has made a decree in favour of the plaintiffs, by which mesne profits have been awarded, jointly against all the defendants, on the basis of the rent payable by the actual cultivators. The defendants judgment-debtors have now appealed to this Court, and on their behalf the decision of the District Judge has been assailed substantially on four grounds: namely, *first*, that the mesne profits up to the date of the decree for possession should have been calculated on the basis of the rent payable by the tenure-holders of the first degree, who held

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immediately under the defaulting proprietors; *secondly*, that the mesne profits, both for the period antecedent and subsequent to the decree for possession, should have been assessed separately in respect of different under-tenures of the same degree, as also in respect of subordinate tenures of different degrees, and that the decree should have specified the separate liability of each under-tenure-holder; *thirdly*, that as some of the judgment-debtors have been released from liability, the effect is to release all the judgment-debtors; and *fourthly*, that in any event, as some of the judgment-debtors have been released from liability on receipt of specified sums from them, the remaining judgment-debtors cannot be made liable jointly and severally for the balance of the entire debt.

In support of the first of these contentions, it has been argued by the learned vakil for the appellants that the effect of a sale for arrears of revenue is not *ipso facto* to avoid all incumbrances and under-tenures, but only to make them voidable till a decree has been made in a suit for annulment of the under-tenures and for recovery of the lands; the possession of the under-tenure-holders is not wrongful, and the purchaser at the revenue sale is consequently not entitled to claim, by way of damages for use and occupation, any sum in excess of what represents the rent payable by the under-tenure-holders. In our opinion this contention is partially sound. The case of *Titu Bibi v. Mohesh Chunder Bagchi* (1), shows conclusively the fallacy of the assumption that the effect of a sale for arrears of revenue is *ipso facto* to avoid all incumbrances and under-tenures. An incumbrance or under-tenure is not *ipso facto* avoided by the sale of an estate for arrears of revenue, and is only liable to be avoided at the option of the purchaser at such sale. As pointed out in the cases of *Kamal Kumari Chowdhurani v. Kiran Chandra Roy* (2), *Mafizuddin v. Korbadi Ali Chowdhuri* (3) and *Mir Waziruddin v. Lala Deoki Nandan* (4), the law does not require any notice as a necessary preliminary to a suit to avoid an under-tenure, but the option of the

(1) (1883) I. L. R. 9 Calc. 683.

(3) (1903) I. L. R. 31 Calc. 393.

(2) (1898) 2 C. W. N. 229.

(4) (1907) 6 C. L. J. 472, 484.

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purchaser may be exercised by the institution of a suit within the time allowed by law. In the case before us, where no notice was given by the purchaser before the commencement of the suit for ejectment, we must hold that the tenure was not annulled till the date of the institution of the suit, that is, the 12th April 1905. We are unable to accept as well-founded the contention of the appellants that the tenure was not annulled till the date of the decree made in the suit for ejectment. There is no authority in support of this view, which is clearly opposed to principle, because, unless it is assumed that there was a cause of action at the date of the institution of the suit, no decree for ejectment could be made therein. We must hold, therefore, that the tenure was annulled with effect from the date of the commencement of the suit, and that, for the period antecedent thereto, the plaintiffs as purchasers at a revenue sale are entitled only to such sum as represents the rent payable by the tenure-holder of the first degree; obviously, a decree for this sum can be made only against such of the defendants as held the tenures directly under the defaulting proprietors, and not against all of them jointly and severally. The first ground taken on behalf of the appellants must, consequently, succeed in part.

In support of the second contention of the appellants, it is argued that in respect of the mesne profits which have accrued during the pendency of the suit for possession, from the date of its institution to the date of delivery of possession, the liability of different tenure-holders of the same degree, and of separate under-tenure-holders of different degrees, should have been separately assessed. In support of this proposition, reliance has been placed upon the cases of *Fuzul Mahomed Mundul v. Raj Coomaree Debee* (1), *Collector of Bograh v. Shama Shankur Mojoomdar* (2), *Sreeputty Roy v. Loharam Roy* (3), *Krishna Mohun Basak v. Kunjo Behari Basak* (4), *Krishna Ram v. Rakmini Sewak Singh* (5) and *Hari Saran*

(1) (1866) 6 W. R. 113.

(3) (1867) 7 W. R. 384.

(2) (1866) 6 W. R. 230.

(4) (1881) 9 C. L. R. 1.

(5) (1887) I. L. R. 9 All. 221.

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Maitra v. Jotindra Mohan Lahiri (1). It has been argued, on the other hand, on behalf of the respondents decree-holders, that the liability of the wrong-doers is joint and several, and in support of this proposition, reliance has been placed upon the cases of *Ganesh Singh v. Ram Raja* (2), *Ajoodhya Doss v. Lalljee Paurey* (3), *Shama Sunkur Chowdhry v. Sreenath Banerjee* (4), *Ram Chunder Surmah v. Ram Chunder Pal* (5) and *Mudun Mohun Singh v. Ram Dass Chuckerbutty* (6). No useful purpose would be served by an analysis and examination of each of these decisions, because not one of them is directly in point. No doubt the liability of wrong-doers in tort is, as a general rule, joint and several; but it cannot be laid down as an inflexible rule, that in every case of tort the Court is bound to pass a joint decree against the wrong-doers, making each jointly and severally liable for the whole amount decreed. In cases of combination like that of *Ganesh Singh v. Ram Raja* (2), where rioters as members of a common assembly, plundered a house, or *Shama Sunkur Chowdhry v. Sreenath Banerjee* (4), where trespassers had colluded to keep the true owner out of possession of his property, or *Ajoodhya Doss v. Lalljee Paurey* (3), where a tenant-in-common had been excluded by the joint action of the defendants from his property which had been divided as a spoil amongst them, or *Ram Chunder Surmah v. Ram Chander Pal* (5), where intermediate tenure-holders had combined wrongfully to keep an auction purchaser out of possession, it is just and reasonable that the tort-feasors should be held jointly and severally liable for the damage sustained by the injured party. In cases, however, where there is no combination, and where, as in *Krishna Mohun Basak v. Kunjo Behari Basak* (7) and *Mudun Mohun Singh v. Ram Dass Chuckerbutty* (6), the injury to the plaintiff, though wrongful in the sense that it is an infraction of his legal rights, has been caused in good faith, or in assertion of an imperfect title, the strict rule of joint and several liabilities cannot justly

(1) (1900) 5 C. W. N. 393.

(2) (1869) 3 B. L. R., P. C., 44;

12 W. R. 38, P. C.

(3) (1873) 19 W. R. 218.

(4) (1869) 12 W. R. 354.

(5) (1875) 23 W. R. 226.

(6) (1880) 6 C. L. R. 357.

(7) (1881) 9 C. L. R. 1.

be enforced. The principle of law which holds all persons concerned in the commission of a tort liable therefor, without regard to the part taken therein by them so long as their acts are not separate and independent, is far-reaching and efficacious : that principle is that persons who act in concert or combination to commit the wrong which actually results in damage to person or property, must each be held liable for the entire damage, no matter what part one may take, so long as there is concerted action. As has been well said in *Place v. Minister* (1), "designing men cannot be allowed to put forth a supple tool to do their bidding, knowingly take the profits of concocted wrong, remain silent, and go unwhipped of justice." In cases, therefore, in which the controlling general principle, namely, that where acts of several persons by design, or by conduct, tantamount to conspiracy, contribute to the commission of a wrong, they are jointly liable, is not applicable, the rule of joint liability also ceases to be applicable. The rule of joint liability, therefore, which, as appears from the case of *Bodreugam v. Arcedekne* (2), referred to in the judgment of this Court in *Harihar Pershad v. Bholi Pershad* (3), was adopted in England as early as the beginning of the fourteenth century, and may be regarded as based on sound principle when applied to cases of combinations or conspiracies, must be applied with some limitations ; otherwise, as pointed out by Lord Herschell in *Palmer v. Wick* (4), it ceases to be a principle of justice or equity, or even of public policy. The same view was indicated by Best C.J. in *Adamson v. Jarvis* (5), and by Peacock C.J. in *Sreeputty Roy v. Loharam Roy* (6). A similar view was taken by this Court in *Hari Saran Maitra v. Jotindra Mohan Lahiri* (7), which was not questioned when the case was taken before the Judicial Committee : *Jotindra Mohun Lahiri v. Guru Prosunno Lahiri* (8). If now we apply these principles

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(1) (1875) 65 N. Y. 89.

(2) (1302) Y. B. 30 Edw. I. 106.

(3) (1907) 3 C. L. J. 383, 390.

(4) [1894] A. C. 318.

(5) (1827) 4 Bing. 66 ; 29 R. R. 503.

(6) (1867) 7 W. R. 384.

(7) (1900) 5 C. W. N. 393.

(8) (1904) I. L. R. 31 Calc. 597 ;
 L. R. 31 I. A. 94.

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to the case before us, what is the position? The plaintiffs are the purchasers of an estate at a sale for arrears of revenue; the defendants are tenure-holders of different grades who held possession of the property under the defaulting proprietors; till the plaintiffs had made their election and indicated to the defendants that they did not want any portion of the rents payable by the actual cultivators to be intercepted by the under-tenure-holders, the defendants were entitled to remain in occupation and to exercise their rights over the property. When the suit for ejectment was commenced, the defendants set up in good faith an intermediate tenure which, however, was found to be inoperative against the plaintiffs purchasers at a sale for arrears of revenue, as it was not established to have been created before the time of the Permanent Settlement. A decree for ejectment was consequently made against them, but there is no foundation for any suggestion that the defendants had combined or conspired to keep the plaintiffs out of possession. Consequently they cannot, in justice, be made jointly and severally liable for the mesne profits, which must be apportioned according to the liability of the various defendants. The question, therefore, arises, what is the principle upon which such apportionment should be made? The obvious answer is that the liability should be apportioned according to the share of the profits intercepted by each defendant. An application of this principle may be illustrated by a concrete example. Assume that before the revenue sale, X, the proprietor of the estate had under him successive tenure-holders of different degrees, A, B, C, the last of whom was the immediate landlord of an occupancy *raiyat* who paid rent at the rate of Rs. 100 per annum. Suppose that C paid rent to B at the rate of Rs. 60 per annum, B paid rent to A at the rate of Rs. 35 per annum, and A paid rent to X at the rate of Rs. 20 per annum. It is obvious that if all the intermediate tenures were annulled, X would be entitled to receive direct from the occupancy *raiyat* Rs. 100 per annum, out of which sum Rs. 40 was intercepted by C, Rs. 25 by B, and the remainder Rs. 35 constituted the sum received by A, out of

which he retained a profit of Rs. 15. If, however, X recovers possession by ejectment of A, B, and C, he should in justice receive as mesne profits Rs. 35 from A, Rs. 25 from B, and Rs. 40 from C. To put the matter in another way : each tenureholder of different degree should be made liable to the purchaser of the estate for the amount of profits retained by him, which is equivalent to the net amount intercepted by him out of the sum payable by the occupancy *raiyat*. We have made no allowance in the illustration for any reasonable deduction that may have to be made on account of collection or other similar charges. In order to apply this principle to the case before us, we have first to determine under-tenures of the second degree, under the tenure immediately subordinate to the proprietary interest, and we have next to determine the under-tenures of successive degrees, under each under-tenure of the second degree. The holders of each of these under-tenures must pay to the plaintiffs respondents the net amount of profits made by them out of rents payable by the occupancy *raiyats*. The result, therefore, is that the second ground upon which the decision of the District Judge is assailed must prevail.

The third ground raises the question of the judgment-debtors other than those that have been released from the claim of the decree-holders. It appears that before the suit was commenced, the plaintiffs entered into a compromise with some of the tenureholders, and subsequent to the commencement of the action, on the 11th February and 12th March 1906, they gave up their claims against some other under-tenure-holders upon payment by them of certain sums as damages. Under these circumstances, it has been argued by the learned vakil for the appellants that the release of some of the tort-feasors from the claim of the plaintiffs operates in law as a release of every judgment debtor. In support of this proposition, reliance has been placed upon the case of *Cocke v. Jennor* (1), where it was ruled that a release granted to one joint tort-feasor, or to one joint-debtor, operates as a discharge of the other joint tort-feasor or other joint-debtor, because the cause of action which is one

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indivisible having been released, all persons otherwise liable thereto are consequently released. From this principle there has been deduced the rule adopted in *Brinsmead v. Harrison* (1) that a judgment in an action against one of several joint tort-feasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied. This result, however, has been attacked on the ground that it is based upon technical rules of English jurisprudence, and is not consistent with principles of justice, equity, and good conscience; and in *Lovejoy v. Murray* (2) and *In re Atlas* (3), the Supreme Court of the United States unanimously held, upon an elaborate review of all the authorities, that a judgment against one joint tort-feasor does not, by itself, bar a recovery against the others, but satisfaction of such a judgment is a bar. In England, also, the tendency has been to restrict the operation of the rule by a refined distinction between a release and a covenant not to sue. Thus in *Duck v. Mayeu* (4), it was ruled that a covenant not to sue one of two joint tort-feasors does not operate as a release of the other from liability. We are, therefore, not prepared to adopt without any limitation the principle of the Common law that the release of one joint wrong-doer operates as a release of all. On the other hand, we are of opinion that the more reasonable and logical rule is that a release of one without any intention to release the other joint tort-feasors, but only as a partial satisfaction, discharges the others only *pro tanto*: *Snow v. Chandler* (5), *Seither v. Philadelphia* (6). No doubt it may be contended, with some show of reason, that the act of the injured party should be taken most strongly against himself, and that, if he releases one joint wrong-doer, it furnishes strong, if not conclusive, evidence that he has been satisfied for the wrong; this theory, indeed, is the foundation of the rule, which is of ancient origin, that an absolute release of one joint tort-feasor operates as a discharge of all. If,

(1) (1872) L. R. 7 C. P. 547.

(2) (1865) 3 Wallace 1.

(3) (1876) 93 U. S. 302.

(4) [1892] 2 Q. B. 511.

(5) (1839) 10 N. H. 92;

34 Am. Dec. 140.

(6) (1889) 125 Pa. 297;

11 Am. St. Rep. 905.

however, the release cannot be considered to be of such import as to be in full satisfaction, the rule ought not to be held applicable. The view we take is supported by the decision in *Jug-garnath Singh v. Ahmedoola* (1). The third ground taken on behalf of the appellants cannot consequently be supported. We may add that, as we have held on the second ground that the liability in the present case is not joint and several, it would in this view be unnecessary to consider whether the release of one joint tort-feasor operates as a release of all, because admittedly that doctrine can apply, if anywhere, only in cases of joint liability.

The fourth ground taken on behalf of the appellants is to the effect that as the plaintiffs have released some of the wrong-doers from liability, their claim against the others have been split up by their own conduct, and that consequently a joint decree ought not to be passed against all the defendants. This contention is obviously well-founded, and is supported by the case of *Bissonauth Tewarry v. Koylashbany Narain Singh* (2). It is not necessary, however, to deal with this point further, as we have already held upon the second ground that the decree ought to specify separately the extent of liability of each under-tenure-holder.

The result, therefore, is that these appeals must be allowed, the orders of the Courts below set aside, and the cases remanded to the Court of first instance, to be dealt with on the lines indicated in this judgment. The Court will be at liberty to take such further evidence as may be needed to elucidate any of the questions which require investigation. There will be no order as to costs.

Appeals allowed.

S. M.

(1) (1867) 8 W. R. 132.

(2) (1863) 2 Hay 297.

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CIVIL RULE

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Doss.*

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March 18.

SHAMSUNDAR SAHA

v.

ANATH BANDHU SAHA.*

*Execution of Decree—Transfer of execution-proceedings—Jurisdiction of executing Court—Presidency Small Cause Courts Act (XV of 1882) s. 31, cl. (b)
—Civil Procedure Code (V of 1908) s. 24.*

The meaning of section 31, cl. (b) of the Presidency Small Cause Courts Act is that the Civil Court to which a decree may be transferred for execution is the Civil Court competent to deal with it under the provisions of Act XIV of 1882, and so also the Court which, under the provisions of the present Code, is competent to deal with it.

Proceedings which are without jurisdiction are not proceedings that can be transferred under the provisions of the old Code, and are equally incapable of transfer under the new Code.

CIVIL RULE.

This was a rule issued in favour of the plaintiffs, Shamsundar Saha and others, to show cause why the order of the Munsif of Tangail should not be set aside.

The petitioners obtained a money-decree in the Court of Small Causes at Calcutta, on the 25th March 1909, against one Anathbandhu Saha, for self and as the only son of Dinabandhu Saha deceased, for the balance of certain sums due to them on account of goods sold. Thereupon, on the application of the petitioners, the decree was transferred to the Court of the Munsif at Tangail for execution. On the 12th May the petitioners applied to the 1st Munsif at Tangail, in whose file the matter had been placed, for attachment and sale of the moveable properties of the judgment-debtors and for his arrest and imprisonment for the realization of the said decretal amount. Process for attachment of the judgment-

* Civil Rule No. 246 of 1910, against the order of Umesh Chandra Sen, Munsif of Tangail, dated Nov. 20, 1909.

debtor's moveables was ordered to be issued, fixing the 7th June 1909 as the date for disposing of the execution case. Later on the petitioners applied for attachment of the judgment-debtor's immoveables, and processes were issued to the effect, again fixing the 7th June 1909 for disposal of the case. On the 7th June 1909, the learned Munsif ordered notice under order XXI, rule 66 of the new Code, to be issued, declaring that the judgment-debtor's immoveables have been actually attached, and that the 12th July had been fixed for the disposal of the case. Thereupon, one Kadambini Dasee, the natural mother and guardian of the minor brother of the judgment-debtor, preferred a claim to the attachment of the moveable and immoveable properties to the extent of his one-half share. On the 20th November last, the Munsif allowed the claim and released one-half from the attachment as belonging to the minor. On the 6th January 1910, one Brajendra Kumar Saha Mandal and others attached the moveable properties of the judgment-debtors that were deposited in Court, and filed an objection to the sale of the judgment-debtor's moveables. On the 8th January 1910, the judgment-debtor and the last-mentioned judgment-creditors objected to the jurisdiction of the Court of the 1st Munsif to the execution of the decree, as it was for a sum above Rs. 1,000. The Munsif considered the objection valid and allowed it, holding that the decree of the petitioner be returned to the Court which sent it for execution and making other orders in connection with it. The plaintiffs decree-holders, thereupon, moved the High Court against the order of the Munsif, contending that the said Munsif had jurisdiction to execute the decree, and that, if the Court had really no jurisdiction, all its previous orders in the matter were also without jurisdiction.

Mr. A. Rasul (with him *Babu Harendrakrishna Mukherji*), for the petitioners. Section 31 of the Presidency Small Cause Courts Act authorizes transfer to any Court. Such a Court need not necessarily have jurisdiction in making such a decree. At any rate, the case may be transferred now to a Court of competent jurisdiction, either on application or by

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this Court of its own motion : section 24 of the new Code referred to. Section 24 is not governed by section 6, the latter section referring only to suits, while the former to suits as well as proceedings.

Babu Rajendra Chandra Guha, for the opposite party. The rule was not issued on the ground of jurisdiction. The provisions of the Presidency Small Cause Courts Act and the Code of Civil Procedure cannot be contradictory and are not. The only difference is that the Small Cause Court can send a decree for execution to another Court directly. Order XXI, rule 8 of the new Code is clear. So was the old Code, section 226 : *Gokul Kristo Chunder v. Aukhil Chunder Chatterjee* (1), *Mungul Pershad Dichit v. Grija Kant Lahiri* (2).

[JENKINS C.J. Section 226 and section 6 are to be read together. Execution proceedings have been treated as suits. There is, however, nothing in the Small Cause Courts Act to control section 31.]

Section 6 applies to the Presidency Small Cause Courts. The executing Court must be a Court of competent jurisdiction. 'Court' means a Court having jurisdiction. Section 31 cannot give jurisdiction where there is none.

Mr. A. Rasul, in reply.

JENKINS C.J. In this case a rule has been issued on the opposite party to show cause why the order of the Munsif at Tangail, first Court, dated the 20th November 1909, should not be set aside, or why such other order should not be passed as to this Court might seem fit and proper. The occasion of this rule was that a decree was passed in this Presidency Small Cause Court in March 1909 for a sum in excess of a thousand rupees. There was an application for transfer of the execution proceedings, which resulted in their being transferred to the Munsif at Tangail, first Court. Certain orders were passed by that Munsif, and on the 20th of November he made an order of release, and it is this order that is named in

(1) (1889) I. L. R. 16 Calc. 457. (2) (1881) I. L. R. 8 Calc. 51 ;
 L. R. 8. I. A. 123.

the rule. Subsequently, an exception being taken to the proceedings, the Munsif, on the 8th of January, made an order to the effect that the proceedings before him were without jurisdiction. Though the rule only mentions the order of the 20th of November 1909, I notice that the application on which the rule was granted referred to the orders generally, and I think we can fairly treat this application as though the order of the 8th of January was called in question, so that what we have to decide is whether or not the Munsif had jurisdiction to entertain these execution proceedings. Now, his jurisdiction did not extend to suits in excess of a thousand rupees, so that, if the matter had to be determined by the terms of the Code, then under the present Code, as under the Code of 1882, the Munsif had not jurisdiction for the purposes of these execution proceedings. Nor do I think that jurisdiction was created by clause (b) of section 31 of the Presidency Small Cause Court Act. This Act is Act XV of 1882, and was passed on the same day as Act XIV of 1882, which was the Code of Civil Procedure of that year; and I think it would be reading into the words of section 31, clause (b), a meaning of which they are not fairly susceptible, when regard is had to the circumstances, if we were to hold that a Civil Court, which was not competent for the purposes of the Code, would be competent by reason of the provisions in this section. I think the fair meaning of section 31, clause (b), must be that the Civil Court to which a decree might be sent for execution was the civil Court competent to deal with it under the provisions of Act XIV 1882, and now is the Court which, under the provisions of the present Code, is competent to deal with it. Therefore, I think the Munsif rightly held that he had no jurisdiction, and that being so, not only will the order of the 10th of November 1909 be of no avail, but the other orders must share the same fate, the order of the 8th of January 1910 being correct.

But then we have been asked to transfer this proceeding from the Court of the Munsif at Tangail to the Court of a Judge having jurisdiction in the matter. No rule has been

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granted which would permit of our making any such order; but apart from that, proceedings that without jurisdiction were not proceedings that could be transferred under the provisions of the old Code, and I think they are equally incapable of transfer under the new Code. The broad result of this is that the applicant has failed, and I think it would be meaningless for us to say that we make the rule absolute so far as it relates to the order of the 20th of November 1909, for that has already come to nothing. I think the proper order for us to make is to discharge the rule with costs.

Doss J. I agree.

Rule discharged.

S. M.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

1910
 March 21.

GUIRAM GHOSAL

v.

LAL BEHARI DAS.*

Criminal Procedure Code (Act V of 1898) s. 147—Dispute concerning the right to act as pujari, and not the right of use of land—Easements.

Section 147 of the Criminal Procedure Code is not limited in its terms to easements, but relates to any dispute concerning the right of use of land or water.

A dispute concerning merely the right to act as *pujari* in a temple, and not the right of use of the land on which it stands, is not within the scope of section 147 of the Code.

Kader Batcha v. Kader Batcha Rowthan (1) not followed.

THERE is a *mandir* or temple of the goddess Sitala at Chatra, near Serampore, belonging to the Satchasi community of the locality, who have been declared by the civil Courts to possess exclusive power of control over the temple officers. About 30 years ago one Rajnarain Ganguli was appointed by the leaders

* Criminal Revision No. 65 of 1910, against the order of W. N. Delevingne, Sessions Judge of Hooghly, dated Sept. 18, 1909.

(1) (1905) I. L. R. 29 Mad. 237.

of the community as the *pujari* of the temple. After his death, and the death of his immediate successors, Guiram Ghosal, the brother of Traylokya Moyi, the daughter-in-law of Rajnarain, was installed as *pujari*, and acted as such for 6 or 7 years. It appeared from the evidence that the owners of the *mandir* (with its income) are the members of the Satchasi community who manage the property, while the *pujari* is a servant of the community who has to perform the daily *puja* worship of the goddess and to keep an account of the fees and offerings received from the public. In April 1909, the opposite party obstructed Guiram in the performance of the *puja*, and tried to eject him forcibly from the temple. A breach of the peace being apprehended, the Sub-Inspector of Serampore, upon the receipt of a petition from Guiram, made a report to the Sub-divisional Officer, who at first issued a prohibitory order under section 144 of the Code, and directed the parties to submit written statements of their respective claims. After hearing them he instituted a proceeding under section 147 of the Code, on the 30th April, stating that there was a likelihood of a breach of the peace between the parties concerning the right of the first party, Guiram Ghosal, to act as a priest, and thereby to appropriate the offerings made to the goddess. The case was then transferred for disposal, on the 12th May, to Babu S. N. Ghose, Deputy Magistrate of Serampore, who, after taking evidence, by his judgment dated the 31st July, declined to make an order under section 147 of the Code, on the grounds that the first party was a servant of the Satchasi community, and that the nature of the services rendered by him as *pujari* did not constitute an easement over the property. The first party then moved the High Court and obtained the present Rule.

Babu Harendra Narain Mitra, for the opposite party. Section 147 of the Criminal Procedure Code applies only to a claim of right of user over the land itself belonging to another. The dispute in this case did not relate to the right of use of the temple or the land on which it stood, but only to the right to celebrate the worship of the goddess as a *pujari*. The proviso

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to the section shows that the right to perform the daily *pūja* is not of such a character as is contemplated in the section: *Empress v. Ganpat Kalwar* (1). The language of section 147 of the Code of 1882 was different in this respect from that of the present section.

Babu Dasharathi Sanyal (with him *Babu Baranasibasi Mookerjee*), for the petitioner, contended that a dispute as to a right to officiate at a temple fell under the section: *Kader Batcha v. Kader Batcha Rowthan* (2), *Muhammad Musaliar v. Kunji Chek Musaliar* (3), *In re Pandurang Govind* (4). The performance of worship necessitates entrance into the *mandir* and the land on which it stands.

STEPHEN AND CARNDUFF, JJ. This case arises under section 147 of the Criminal Procedure Code. There is a dispute between the parties, one of whom claims as against the other an hereditary right to perform the duties of *pūjari* of an idol in a certain temple. The other party makes the case that the first party is merely a servant. On the matter coming before the Magistrate, he held that he had no jurisdiction under section 147 of the Criminal Procedure Code to deal with this dispute, because the rights set forth by the petitioners did not amount to an easement over any land.

We have granted a rule to show cause why this order should not be set aside on the ground that the Magistrate had jurisdiction to deal with the case. On considering the matter and hearing the arguments of the learned pleaders, we are of opinion that the Magistrate was right. Section 147 of the Criminal Procedure Code, as has been pointed out, is not in terms confined to easements, but relates to any dispute concerning the right of use of land or water. In the present case, there is no doubt a dispute; but, looking at the terms of the section, we cannot consider that it is the right of use of land that is here in dispute. It may be that it is impossible to perform the duties of a *pūjari* without entering upon the land on

(1) (1900) 4 C. W. N. 779.

(2) (1905) I. L. R. 29 Mad. 237.

(3) (1887) I. L. R. 11 Mad. 323.

(4) (1900) I. L. R. 24 Bom. 527.

which the temple is built. But it is the worship which is disputed, and not the use of the land. The expression "land" is not defined in the Code of Criminal Procedure, but it is to be observed that, for the purposes of the somewhat analogous provisions of section 145, it is not referred to as necessarily including buildings. Another view has been adopted by the Madras High Court in *Kader Batcha v. Kader Batcha Rowthan* (1), following a previous decision of the same Court; but we can only say that, looking at the obvious purposes for which the section was intended, and considering also the scope of section 145 of the Code, we think that the present dispute is certainly not one which it was intended that section 147 should cover.

The result is that the rule is discharged.

E. H. M.

Rule discharged.

(1) (1905) I. L. R. 29 Mad. 237.

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CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

ISHWAR CHANDRA SINGH

v.

EMPEROR.*

1910
March 23.

Opium—Illicit sale—Proof of the factum of the sale—Presumption from inability to account satisfactorily for opium in absence of evidence of any sale—Opium Act (I of 1878) ss. 9, 10.

The effect of ss. 9 and 10 of the Opium Act, 1878, is that, when once it is proved that the accused has dealt with opium in one of the ways described in s. 9, the *onus* of showing that he had a right so to deal with it is placed on him by s. 10. But the commission of the act, which is the foundation of the particular offence charged under section 9, must be proved before the presumption raised by section 10 comes into operation at all, and the presumption cannot be used to establish such act.

Where, therefore, there is no evidence to prove the fact of any sale of opium by a person accused of illicit sale, the deficiency is not supplied by the statutory presumption, and a conviction of illicit sale is bad.

* Criminal Revision No. 27 of 1910, against the order of G. C. Banerjee, Sessions Judge of Chittagong, dated Nov. 1, 1909.

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THE petitioner, Ishwar Chandra Singh, was the servant of one Johiruddin Bepari, a licensee for the sale of opium at a shop in Mahajan's Hât, some miles from the town of Chittagong, and was in charge, with one Serajuddin, of his master's *guddi* in Feringi Bazar in the town, where all the opium and exciseable articles were kept for the night. On the 22nd March 1909, Ishwar bought a ball of opium, weighing a seer, on behalf of his master, from the local treasury, and took it to the *guddi*, where it was kept in a tin box. It was the duty of the petitioner, under the rules, to transport the opium within two days of the purchase to the shop at Mahajan's Hât, where alone, under the terms of the license, it could be sold. On the morning of the 23rd the Excise Sub-Inspector went to the Chittagong railway station and found Ishwar there. The latter, on being questioned about the opium, is alleged to have said that he had left it behind, whereupon the Sub-Inspector accompanied him to the Feringi Bazar *guddi*, but failed to find it there. Ishwar is said next to have explained that he had left it with Serajuddin, but the latter stated that it was kept in the tin box, the key of which was with Ishwar. Finally, on the 25th the petitioner reported to the police that it had been stolen. The petitioner and Serajuddin were put on their trial, under section 9 (f) of the Opium Act, 1878, before Babu Ramani Mohan Das, Deputy Magistrate of Chittagong, who convicted them on the 26th July and sentenced each to a fine of Rs. 500. On appeal, the Sessions Judge acquitted Serajuddin, and reduced the fine of Ishwar to Rs. 150, holding that, although there was absolutely no evidence of the sale, there was some circumstantial evidence which, taken with the provisions of section 10 of the Act, was sufficient to establish it. Both Courts disbelieved the story of the theft of the opium eventually set up by the accused. The petitioner, thereupon, obtained the present rule from the High Court.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.
There was no direct evidence of the sale of the opium purchased by the petitioner, but it is found by both Courts that his

story of theft is false. He has not, therefore, accounted for the opium, and, under section 10, the presumption arises that he has committed an offence against the Opium Act.

Babu Harendra Narain Mitra, for the petitioner. Section 10 of the Opium Act does not mean that, because a man cannot account satisfactorily for opium found with him, he must be taken to have committed one of the acts specified in section 9. It must first be proved that he has done a particular act enumerated in clauses (a) to (f), and then the presumption applies if he cannot satisfactorily account for the opium: *Chedi Mala v. King-Emperor* (1). The presumption cannot be used to prove the fact of sale as has been done in his case by the learned Judge. There was no transport of opium here. It was bought at the Excise Office and taken to the *guddi* for safe custody pending transport to Mahajan's Hât.

STEPHEN AND CARNDUFF, JJ. The petitioner in this case was charged with having sold opium in contravention of the provisions of the Opium Act, 1878, and the rules framed thereunder. This is, of course, a charge of an offence under section 9, clause (f), of the Act. The facts of the case have not been disputed before us, and, as far as we are concerned with them, are as follows. The petitioner, Ishwar Chandra Singh, is the servant of one Johiruddin Bepari, who has a shop at Mahajan's Hât, at some little distance from Chittagong, and is licensed under the Act to sell opium there. On the 22nd March 1909, Ishwar bought, on behalf of his master, a seer of opium from the Excise Office at Chittagong. It was his duty, under the rules applicable to the case, to transport the opium within two days of its purchase to the premises at Mahajan's Hât, where alone, under the terms of the license, it was lawful to sell it, and it is not denied that it was an offence to sell it anywhere else. He did not take it to Mahajan's Hât within the prescribed time, and, when asked what had become of it, he said that it had been stolen, a statement which has been disbelieved, for very good reasons, by both the Courts below. He has, therefore,

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failed to account for the opium he received ; but we have granted this rule on the District Magistrate calling on him to show cause why the conviction should not be set aside on the ground that the facts found do not disclose the commission of the particular offence charged.

The Judge in the Court of Appeal below has found that, although there is absolutely no evidence of the alleged sale, there is some circumstantial evidence, which, taken with the provisions of section 10 of the Act, was sufficient for the conviction of the petitioner. We agree as to the absence of any evidence of a sale, but prefer to say that what evidence there is merely shows that there was plenty of opportunity for a sale, and raises a suspicion that the petitioner sold the opium. But we fail to understand how any deficiency in the evidence as to the fact of sale can be supplied by the presumption referred to. Section 9 of the Act penalises certain acts done in relation to opium, if done illicitly, and section 10 runs as follows :—

“ In prosecutions under section 9 it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily, is opium in respect of which he has committed an offence under this Act.”

Now, penal clauses in Acts must be construed in the same way as others ; and it is obvious that in the latter provision some limitation must be placed on the words “ all opium for which the accused is unable to account satisfactorily,” as the phrase would in terms include in any case most of the opium in the world. The intention, however, seems to us evident, and the effect of the two sections appears to be simply this, that, when once it is proved that an accused person has dealt with opium in any of the ways described in section 9, the *onus* of proving that he had a right so to deal with it is thrown on him by section 10. But the commission of an act, which may be an offence, must be proved before the presumption comes into play at all, and, therefore, the presumption cannot be used to establish the fact.

The result is, that the defective evidence of the sale in this case cannot be supplemented by the presumption raised by

section 10, and the conviction for illicit sale is bad. On the other hand, it is clear that on the facts proved the petitioner might have been convicted of the unlawful transport of opium. We do not, therefore, consider it necessary to interfere in revision, and the rule is discharged.

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Rule discharged.

E. H. M.

CRIMINAL REVISION.

Before Mr. Justice Carnduff and Mr. Justice Richardson.

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March 30.

Demolition of building—Calcutta Municipal Act (Beng. Act III of 1899) ss. 18, 102 (1) (c), 391, 449—Sanction by District Building Surveyor of additions to contemplated building—Delegation of power by Chairman—Legality of sanction—Sanction of General Committee—Proceeding under s. 449—Application thereunder to Magistrate, signed for the Chairman by the Secretary to the Corporation and the General Committee—Irregularity.

An addition to a contemplated building sanctioned by a District Building Surveyor, to whom the power of sanction has been delegated by the Chairman under s. 18 of the Calcutta Municipal Act, 1899, is a duly authorized erection, and the sanction of the General Committee under s. 391 is not necessary.

Section 391 applies only to alterations of, and additions to, existing buildings.

Where the General Committee approved of the suggestion of the Building Sub-Committee that certain additions to a building were unauthorized, and that an application should be made to the Magistrate under section 449 of the Act, and directed the Chairman to make it, whereupon an application was made, purporting to come from the Chairman but signed by the Secretary to the Corporation, who was also Secretary to the General Committee:—

Held, that the irregularity, if any, was cured by section 102 (1) (c) of the Act.

ON 9th December 1907, the petitioner applied to the Chairman of the Calcutta Corporation for sanction to build a three-

* Criminal Revision No. 165 of 1910, against the order of Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated Dec. 23, 1909.

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storied house on the premises No. 22, Darmahatta Street, and submitted a plan thereof, which was returned, and the sanction refused, on the 1st February 1908, on certain grounds. He sent in a modified plan on the 5th, and one Nogendra Nath Ganguli, a District Building Surveyor of the Corporation, sanctioned the building, as a delegate of the Chairman, on the 31st March. On the 6th May the petitioner applied to the Chairman for sanction to certain additions to the building, viz., a three-storied verandah with stairs and a cook-room on the fourth storey, enclosing a plan of the same. The sanction was ultimately accorded purporting to be granted under section 391 (2) of the Calcutta Municipal Act, by N. C. Bose, a District Building Surveyor of the Corporation, acting as a delegate of the Chairman, on 6th August. The building was subsequently commenced and completed on the 2nd December. A week after a notice was served on the petitioner by the Chairman requiring him to bring his building into conformity with the sanctioned plan. Thereafter, N. C. Bose submitted the case to the Building Sub-Committee, alleging that the sanction was obtained under a false pretence by showing on the plan an open plot of land belonging to the adjoining premises as a common passage, and that rules 17, 22 and 24 of Schedule XVII had not been observed. The Building Sub-Committee recommended an application to the Magistrate under section 449 of the Act, and the General Committee confirmed their recommendation, on the 19th March 1909, and directed the Chairman to make it on its behalf. On the 25th March a written application, purporting to come from the President of the General Committee and the Chairman, and signed by Babu P. N. Mukherjee, the Secretary to the Corporation and the General Committee, was made to the Municipal Magistrate, under section 449, for demolition of the unauthorized portions of the building. Proceedings under the section were then instituted before the Magistrate, and he, by his order dated the 23rd December, directed the demolition of the objectionable portions.

The petitioner then moved the High Court and obtained the present rule.

Dr. Rashbehary Ghose and Babu Mohini Mohan Chatterjee,
for the petitioner.

Mr. Stokes and Babu Debendra Chandra Mallik, for the
Corporation.

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CARNDUFF AND RICHARDSON, JJ. This is a rule to show cause why an order passed by the Municipal Magistrate for the demolition of a building in Calcutta should not be set aside on two grounds, namely, *first*, because the Secretary to the Corporation had no power to make the application which ended in the order complained of ; and, *secondly*, because the building in question had been duly sanctioned.

Taking the second ground first, we find that in the month of August 1908, sanction was accorded by the District Surveyor, under powers delegated to him by the Chairman, to the erection of a certain building. Subsequently another application was made for sanction to an addition to the building as originally proposed, and this likewise was granted by the District Surveyor. No building operations of any kind were begun till after the second application had been disposed of. The contention of Mr. Stokes on behalf of the Municipality is that the District Surveyor had no authority to grant the second sanction, inasmuch as the case was one of sanction to an addition to a building falling under section 391 of the Calcutta Municipal Act, and, therefore, the only authority by which the sanction could have been granted, was the General Committee. But it seems to us to be perfectly clear that section 391 of the Act applies only to alterations of, and additions to, existing buildings, and that it is impossible to accept the contention that a supplementary application, proposing an addition to an already sanctioned plan of a contemplated building, can be held to fall within its scope. We think, then, that the additional erection, which was made on the strength of the District Surveyor's approval, was duly sanctioned, and that on this ground the rule must be made absolute.

The second point is that the Secretary to the Corporation. who is, be it remembered, also Secretary to the General

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Committee, had no power to make the application to the Magistrate. As we have disposed of the rule on the other ground, it is unnecessary for us to say more than that we are inclined to think that, if there was any defect or irregularity in this connection, it is covered by section 102 (1) (c) of the Act, which provides that "no act done or proceeding taken under the Act shall be questioned on the ground merely of any defect or irregularity not affecting the merits of the case." Dr. Rashbehary Ghose, who has appeared on behalf of the petitioner, admits that there can be no question as to the General Committee's having expressly approved of the making of an application under section 449. Admittedly, therefore, the fact remains that the application was made in pursuance of the wishes of the General Committee, and, if the presentation of it by the Secretary to that Committee was not strictly in accordance with the requirements of the Act, we cannot, at the moment, think of a more appropriate case for the application of section 102.

The rule is made absolute, and the order is set aside.

Rule absolute.

E. H. M.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

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1910

April 1.

Mortgage—Registration—Registration Act (III of 1877) s. 17, cl. (n)—Enrolment on a mortgage-bond of payment made in satisfaction of a previous mortgage-debt—Civil Procedure Code (Act XIV of 1882) s. 43—Payment by a subsequent mortgagee under s. 74 of the Transfer of Property Act (IV of 1882), effect of.

The endorsements on a mortgage-bond of payments made in satisfaction of a mortgage, which payments did not purport to extinguish the mortgage, are covered by cl. (n) of section 17 of the Registration Act, and as such do not require registration.

Jivan Ali Beg v. Basa Mal (1) and *Uppalakandi Kunhi Kutti Ali Haji v. Kunnam Mithal Kottapraath Abdul Rahiman* (2) followed.

A subsequent mortgagee who makes a payment of a prior mortgage-debt under the provisions of section 74 of the Transfer of Property Act, in a suit to enforce his original mortgage against the security which, by his payment of the former mortgage, he has protected and made more valuable for the realisation of his debt, is bound, under s. 43 of the Code of Civil Procedure, to join in that suit any further claim which he has against that property by reason of such payment made by him.

Sundar Singh v. Bholu (3) distinguished

SECOND APPEAL by the plaintiff, Hari Narain Banerjee.

The defendant No. 1, Shama Sundari, executed two mortgage bonds in favor of Jagannath Shaha, defendant No. 2, one dated the 16th of Agrahayan 1302 (28th November 1895), and the other the 29th Jaista 1304 B. S. (6th of June 1897). In 1305 B. S. (1898 A. D.), defendant No. 1 mortgaged to the plaintiff certain other properties including the properties covered by

*Appeal from Appellate Decree, No. 716 of 1907, against the decree of Arthur Goodeve, District Judge of Birbhum, dated Jan. 28, 1907, confirming the decree of Umesh Chandra Sen, Subordinate Judge of Birbhum, dated May 30, 1906.

(1) (1886) L. L. R. 9 All. 108.

(2) (1896) I. L. R. 19 Mad. 288.

(3) (1898) L. L. R. 20 All. 322.

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the two aforesaid mortgage-bonds, and borrowed from him a larger sum of money. On the 14th of January 1903, the plaintiff paid off the amounts due on the two mortgage-bonds of 1895 and 1897, and the payments were endorsed on the bonds, and the bonds were handed over to the plaintiff. The plaintiff brought a suit against defendant No. 1 on the basis of his bond of 1898 and obtained a decree. In the meantime defendant No. 1 sold her interest in the mortgaged properties to defendants Nos. 2, 3 and 4, and these defendants paid to the plaintiff the amount of the decree which he had obtained against defendant No. 1. The present suit was brought by the plaintiff to recover the money due on the two bonds of 1895 and 1897, which he had paid to Jagannath Shaha, defendant No. 2.

The defence was that the two bonds in favor of Jagannath Shaha were not executed by Shama Sundari; that the plaintiff had no right to pay off those bonds; that he acquired no right to the mortgaged properties by virtue of his alleged payment; and that the suit was barred by section 43 of the Civil Procedure Code, 1882.

The Court of first instance held that the plaintiff acquired no interest in the mortgaged properties by virtue of the alleged payment, inasmuch as the endorsement on the back of the bond was not registered; it also held that the suit was barred by section 43 of the Civil Procedure Code, but passed a modified decree holding that the plaintiff was entitled to a personal decree against defendant No. 1 for the amount due under the bond of 1304 B. S. (1897 A. D.) only.

Both the parties appealed to the District Judge, who allowed the appeal of the defendant and dismissed that of the plaintiff.

Against this decision the plaintiff appealed to the High Court.

Mr. Hill (with him *Babu Naliniranjan Chatterjee*), for the appellant. The learned District Judge was wrong in dismissing the suit on the ground that the receipts given to the plaintiff by Jagannath had not been registered as required by sections

17 and 49 of the Indian Registration Act (III of 1877). Plaintiff made the payments as a puisne mortgagee, under section 74 of the Transfer of Property Act (IV of 1882), and the endorsements on the mortgage bond of such payments in satisfaction of the prior mortgages do not require registration under the Act, it comes within the purview of clause (n) of section 17 of the Act (III of 1877), as amended by Act VII of 1886, and as such is exempted from the operation of clause (b) and clause (c) of section 17. Payment to Jagannath had the effect of transferring and not of extinguishing the mortgage. The mortgage continued, and the intention of the parties was to pay off the charge; and the mere fact that it was paid off did not extinguish the mortgage. Nor was it an assignment within the meaning of clause (c) of section 17 of the Act, as no formal assignment was necessary. The cases of *Jiwan Ali Beg v. Basa Mal* (1) and *Uppalakandi Kunhi Kutti Ali Haji v. Kunnam Mithal Kottapraath Abdul Rahiman* (2) support my contention. The cases of *Safdar Ali Khan v. Lachman Das* (3) and *Gurdial Mal v. Jauhri Mal* (4) are also in my favor.

The suit was not barred by section 43 of the Civil Procedure Code (Act XIV of 1882). The section does not apply, inasmuch as "the cause of action" in the suit on the second mortgage is not the same as that on the prior mortgage. Under section 85 of the Transfer of Property Act, I was not bound to include in my previous suit any claim that I had on account of having paid off the prior mortgages, the first mortgagee had not an "interest in the property comprised" in the second mortgage, for the property comprised in the suit to enforce the second mortgage is the interest of the mortgagor in the property *minus* the mortgagor's right of equity of redemption of the prior mortgage. I rely on the cases of *Sundar Singh v. Bholu* (5) and *Dorasami v. Venkateshazharyar* (6).

Mr. B. Chakravarti (with him *Mr. B. C. Seal, Babu Taruck Chunder Chuckerbutty, and Babu Manindra Lal Banerjee*), for

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(1) (1886) I. L. R. 9 All. 108.

(4) (1885) I. L. R. 7 All. 820.

(2) (1896) I. L. R. 19 Mad. 288.

(5) (1898) I. L. R. 20 All. 322.

(3) (1879) I. L. R. 2 All. 554, 558.

(6) (1901) I. L. R. 25 Mad. 108.

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the respondents. The receipts should have been registered as required by the provisions of the Registration Act. The plaintiff ought to show that he is an assignee of the prior mortgagee, and as such he is entitled to his interest and rights. The assignment can only be made by a registered instrument. Section 74 of the Transfer of Property Act provides a more economical method than the method of an assignment of the mortgage by deed, provided it fulfils the requirements of law. The words "subject to the provision of law...regulating the registration of documents" in section 74 of the Transfer of Property Act refers to section 17, clause (c) of the Indian Registration Act, and they would be absolutely meaningless if an endorsement of the present nature did not require registration; for in what cases then would the receipt require registration? The receipts purported to extinguish the rights of Jagannath, the defendant No. 2, and assign them to the plaintiff: *Ganpat Pandurang v. Adaji Dadabhai* (1).

The suit is also barred by section 43 of the Code of Civil Procedure (XIV of 1882). The whole object of the Transfer of Property Act is to work up the rights and liabilities of the mortgagor and the mortgagee, and to avoid multiplicity of suits. Section 85 of the Transfer of Property Act contemplates that all persons interested in the property should be made parties: *Dorasami v. Venkataseshayyar* (2) and *Keshavram Dulavram v. Ranchhod Fakira* (3). The meaning of "cause of action" has been well discussed in the last case. The plaintiff is a subsequent mortgagee who has acquired all the rights and powers of the prior mortgagee subject to his position as the holder of his own mortgage; and he was bound to include in the previous suit his present claim.

Mr. Hill, in reply.

Cur. adv. vult.

BRETT AND SHARFUDDIN, JJ. Shama Sundari, defendant No. 1, executed in favour of one Jagannath Shaha, defendant

(1) (1877) I. L. R. 3 Bom. 312, 318. (2) (1901) I. L. R. 25 Mad. 108.

(3) (1905) I. L. R. 30 Bom. 156.

No. 2, two mortgaged bonds by which, as security for payment of the mortgage debts, she hypothecated an 8 annas share of the *dar-patni* right in taraf Nalhati. The first of these deeds was executed on the 16th Agradhayan 1302 (28th November 1895), and was for a debt of Rs. 621 ; the second was executed on the 29th Jaista 1304 (6th June 1897) and was for a debt of Rs. 713.

Shama Sundari with her daughter, daughter's son, etc., executed, on the 29th June 1898, a third mortgage bond in favour of the plaintiff Hari Narain Bannerjee to cover a debt of Rs. 4,237, and hypothecated, as security, not only the 8-anna *dar-patni* right already mortgaged in the two previous bonds, but also the 8-anna *patni* right in the same property and 8-anna *zemindari* and *patni* rights in other properties.

On the 14th January 1903, the plaintiff paid off the two debts due on the bonds of Jagannath Shaha, and the payments were endorsed on the bonds, and the bonds handed over to the plaintiff.

On the 14th January 1905, the defendant No. 1 sold to defendants 3, 4, and 5 the 8 annas *dar-patni* right in taraf Nalhati which had been hypothecated in the two mortgage bonds executed in favour of Jagannath Shaha.

The present plaintiff brought a suit to enforce his mortgage of the 20th June 1898 and obtained a decree. The decretal debt was paid off with the money obtained from defendants 3, 4, and 5.

The present suit was instituted on the 8th July 1905 by the plaintiff to recover the money which he had paid to Jagannath Shaha in discharge of the two debts due to him from Shama Sundari Dasi under his two mortgage bonds.

The main points raised in the lower Courts in defence to the suit were (i) that the plaintiff was not entitled to bring the suit to recover the money due on the bonds executed in favour of Jagannath Shaha, because the receipts given to him by Jagannath Shaha had not been registered as required by sections 17 and 49 of the Registration Act ; and (ii) that the suit was barred by the provisions of section 43 of the Civil Procedure Code, as the plaintiff was bound to include in his suit brought for the

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enforcement of his mortgage debt the claim which he had after discharging the debts due to the prior mortgage.

The lower Appellate Court has held that both these pleas should prevail and has dismissed the plaintiff's suit. Further, the District Judge has held that section 85 of the Transfer of Property Act would have applied, and that the plaintiff was bound, in his suit to enforce his own mortgage, to include the claim which he now sets forward on the ground that he has paid off the prior mortgage debts.

The plaintiff has appealed. The same two points have been pressed in appeal before us.

On the first point, we are unable to agree with the view taken by the lower Appellate Court that registration of the receipt was required by the law in order to give the plaintiff all the rights and powers of the prior mortgagee. There can be no doubt, and the contrary is not even suggested by the defendants, that the plaintiff, when paying off the debts due to Jagannath Shaha, had no intention of extinguishing the mortgages so as to relieve the mortgagor from all future liability for the mortgage debts. In such circumstances we have no doubt that the provisions of clause (n) of section 17 of Act III of 1877 (which was added by the amending Act VII of 1886) apply, and that such endorsements are expressly excluded by it from the operation of clause (c) of the same section. The endorsements in the present case are endorsements acknowledging the payment of the whole or any part of the mortgage money, or any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage. The extinction or transfer of the rights of Jagannath Shaha by the payment to him by the plaintiff of the sums due under the mortgages neither purported to extinguish, nor had the effect of extinguishing, these mortgages. The payments were simply made by the plaintiff as puisne mortgagee for his own protection under the right given to him by section 74 of the Transfer of Property Act. Nor was the registration of the receipt necessary as an assignment. No formal assignment of the rights of the mortgagee, Jagannath, to the plaintiff being

under the law necessary, as the plaintiff, after obtaining the receipt from Jagannath, had under section 74 of the Transfer of Property Act acquired all the rights and powers as mortgagee which Jagannath had under his prior mortgages. It is not, therefore, necessary for us to discuss the rulings to which we have been referred on this point. We need only say that the cases of *Safdar Ali Khan v. Lachman Das* (1), *Gurdial Mal v. Jauhri Mal* (2) have no application to the present case, the facts being different. The cases of *Jivan Ali Beg v. Basa Mal* (3) and *Uppalakandi Kunhi Kutti Ali Haji v. Kunnam Mithal Kottapraath Abdul Rahiman* (4) support the view which we take that endorsements on a mortgage bond of payments made in satisfaction of a mortgage, which payments did not purport to extinguish the mortgage, are covered by clause (n) of section 17 of the Registration Act, and do not come within the purview of clause (b) or (c) of that section.

On the second point, however, we are of opinion that the plaintiff's suit must fail, and that it is barred by the provisions of section 43 of the Civil Procedure Code.

The Judge of the lower Appellate Court has expressed the opinion that the provisions of section 85 of the Transfer of Property Act might be applied to a case like the present so as to compel the plaintiff, when bringing his suit on his subsequent mortgage, to include in it any claim that he might have on account of having paid off the two prior mortgages. Against the acceptance of this view there is, however, the fact that the property comprised in the suit to enforce the second mortgage is the interest of the mortgagor in that property, which is left after excluding the interest hypothecated under the first mortgage, that is to say, the mortgagor's right of equity of redemption of the prior mortgage. Strictly speaking, therefore, the first mortgagee has not an interest in the property comprised in the second mortgage. But at the same time we doubt, having regard to the expression used in section 85 of the Transfer of Property Act, whether it was not the intention of the Legislature

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(1) (1879) I. L. R. 2 All. 554.

(3) (1886) I. L. R. 9 All. 108

(2) (1885) I. L. R. 7 All. 820.

(4) (1896) I. L. R. 19 Mad. 288.

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that all persons interested in the immoveable property, against which the plaintiff sought to enforce his mortgage, should not be made parties to the suit, whether those persons be prior or subsequent mortgagees, if the plaintiff had notice of such interests. The object of the section appears to us to be to protect alike the interests not only of all mortgagors and mortgagees, but also of *bonâ fide* purchasers for value.

On behalf of the appellants, reliance has been placed on the decision of the High Court of Allahabad in the case of *Sundar Singh v. Bholu* (1), and it has been argued that under the law there is nothing to prevent the holder of two independent mortgages over the same property from obtaining a decree for sale on each of them in a separate suit. It has been argued that section 43 of the Civil Procedure Code cannot be taken to apply, as the cause of action in the suit on the second mortgage is not the same as that on the prior mortgage. In the case relied on, however, the Judges were careful to observe that "it was difficult to see what benefit the two decrees would be to the plaintiffs, except that they might execute one of the decrees by sale of the property, and, if there was a surplus arising from the sale, they might probably attach the surplus in execution of the other decree."

That decision has been dissented from by the High Courts of Madras and Bombay in the cases of *Dorasami v. Venkateshayyar* (2) and *Keshavram Dulavram v. Ranchhod Fakira* (3) respectively. Moreover, it cannot, in our opinion, be taken to apply to the facts of the present case.

The present plaintiff is not a mortgagee who has taken two separate mortgages from the same person, but he is a subsequent mortgagee who, as such, has been enabled, under the provisions of section 74 of the Transfer of Property Act, to pay up the prior mortgages in order to protect and strengthen the security for payment of his debt which he held under the subsequent mortgage. Though by so doing he acquired all the rights and powers of the prior mortgagee, he must be taken to

(1) (1898) I. L. R. 20 All. 322.

(2) (1901) I. L. R. 25 Mad. 108.

(3) (1905) I. L. R. 30 Bom. 156.

have done so subject to his position as the holder of his own mortgage. When, therefore, he sought to enforce by suit his original mortgage against the security which by his payment of the former mortgage he has protected and made more valuable for the realisation of his debt, he was bound in our opinion to join in that suit any further claim which he had against that property by reason of payments made by him under section 74 of the Transfer of Property Act, the sum so paid being treated as an addition or accretion to the claim on his original mortgage. In such circumstances the present plaintiff was, under the provisions of section 43 of the old Code of Civil Procedure, bound to include the present claim in the suit brought on his mortgage, and as he failed to do so, he is barred in the present suit from enforcing his claim or pursuing his remedy by sale of the property in suit.

We see no reason to differ from the view taken by the Judge of the lower Appellate Court with regard to the right to a personal remedy against defendant No. 1 claimed by the plaintiff. The payment by the plaintiff to the prior mortgagee of the mortgage debt due from defendant No. 1 within 6 years from the due date of the second mortgage would not entitle the plaintiff to a further period of limitation against that defendant.

For the above reasons, we confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

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April 4.

GOPENDRA CHANDRA MITTER

v.

TARAPRASANNA MUKERJEE.*

*Chaukidari Chakran land—Village Chaukidari Act (Beng. VI of 1870) s. 49—
Assessment of rent by Collector—Right of landlord to claim fair and equitable
rent.*

The right of a landlord to claim rent, when making a settlement of resumed *chaukidari chakran* lands with a putnidar, is not restricted to the amount of assessment made by the Collector under s. 49 of the Village Chaukidari Act (Beng. Act VI of 1870); he is entitled to claim a fair and equitable rent.

Hari Narain Mozumdar v. Mukund Lal Mundal (1) and *Kazi Newaz Khoda v. Ram Jadu Dey* (2), referred to.

APPEAL by the defendants, Gopendra Chandra Mitter and another.

This appeal arose out of a suit brought by the plaintiffs as zemindars against the defendants, who were putnidars, to recover *khas* possession of certain resumed *chaukidari chakran* lands. The plaintiffs sought to recover possession of these lands on the grounds that the Collector having taken proceedings under Bengal Act VI of 1870 made over those lands to the plaintiffs as part of their zemindary, and that the defendants had no right to hold these lands against them. The plaintiffs, in the alternative, claimed to recover fair and equitable rent, should the defendants be found to be entitled to retain possession of those lands.

The putnidars pleaded, *inter alia*, that they were entitled to retain possession of the *chaukidari chakran* lands, and that the plaintiffs could not demand a higher rent from them than the

*Appeal from Original Decree, No. 260 of 1907, against the decree of Agnore Chandra Hazra, Subordinate Judge of Burdwan, dated Feb. 12, 1906.

(1) (1900) 4 C. W. N. 814.

(2) (1906) I. L. R. 34 Calc. 109;
5 C. L. J. 33.

amount assessed by the Collector under section 49 of Bengal Act VI of 1870.

The Court below dismissed the plaintiffs' claim for *khas* possession, but held that they were entitled to recover from the defendants a fair and equitable rent.

Against this decision the defendants appealed to the High Court.

Babu Nilmadhab Bose, Babu Dwarkanath Mitra, Babu Sailendra Nath Palit, Babu Narendra Chandra Bose and Babu Naresh Chandra Sinha, for the appellants.

Babu Naliniranjan Chatterjee and Babu Nanda Lal Banerjee, for the respondents.

Cur. adv. vult.

BRETT AND SHARFUDDIN, JJ. The present appeal arises out of a suit brought by the plaintiffs as zemindars of lot Chanak against the defendants Nos. 1 and 2, the putnidars of 9 mouzahs included in that towji. The plaintiffs sought to recover *khas* possession of 201 bighas odd of resumed chowkidari chakran lands lying within those 9 mouzahs and for *wasilat*, or, in the alternative, if the defendants should be found entitled to retain possession of the lands, to recover fair and equitable rents of the lands from the defendants. The rent they claimed was Rs. 500 for the 201 bighas of land. The defendants Nos. 1 and 2, the putnidars, contended that they were by law entitled to the possession of the chaukidari chakran lands after their resumption by the Collector, and that the plaintiffs, as zemindars, could not demand a higher rent from them than the amount which was assessed by the Collector under section 49 of Bengal Act VI of 1870. The lower Court has dismissed the plaintiffs' claim for *khas* possession of the lands, holding that, under the condition of the putni lease, the putnidars are entitled to settlement of those lands from the landlords in preference to anybody else. The Subordinate Judge, however, held that the plaintiffs were entitled to recover from the defendants a fair and equitable rent, and he fixed the same at Rs. 408-8 for the 201 bighas of land. We may observe

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that that was the total rent which was fixed by the Collector, half of which he assessed, under section 49 of Bengal Act VI of 1870, as the amount to be paid by the zemindars to the Chaukidari fund. It has not been seriously contested before us that the lower Court is not right in its conclusion that the putnidars, under the terms of the lease; are entitled to a settlement of the resumed chaukidari chakran lands; but the points which have been urged in support of the appeal are—(i) that the plaintiffs are not entitled to demand a higher rent from the putnidars than the amount assessed by the Collector under section 49 of Bengal Act VI of 1870, and (ii) that, even if the plaintiffs are entitled to more, the amount assessed by the lower Court is excessive. It is admitted that the decision on these points must to a considerable extent depend on the construction of the putni lease or kabuliati. The present defendants are the purchasers of the rights of the original putnidar. The putni kabuliati, dated the 18th Jaistha 1280 (30th May 1873) was originally executed by one Srimanta Roy in favour of the predecessor-in-interest of the present plaintiff. That kabuliati has been produced in evidence, and Nilkant Roy, son of Srikant Roy, the original lessee, has been examined on behalf of the defendants. The clause in this kabuliati, which is construed differently by the appellants and the respondents, runs as follows :—

“চৌকিদারী চাকরাণ জমা কিম্বা জেলার তপশীল থানার চাকরাণ জমা সদর বাজেয়াপ্ত হইলে যে জমায় সরকার বাহাদুর হইতে আপনকার বন্দোবস্ত করিয়া লইয়া আমাকে যে জমায় বন্দোবস্ত করিবেন সে জমায় আমি বন্দোবস্ত করিয়া লইতে স্বীকার না হইলে অগ্র ব্যক্তিকে বন্দোবস্ত করিবেন, তাহাতে আমার ও আমার ওয়ারিসানের কোনও ওজর আপত্তি চলিবে না।”

On behalf of the appellants, it has been contended that the meaning of this passage is that, if the putnidar refused to take settlement of the chaukidari chakran lands from the zemindar at the same jama as that at which settlement of the same was made with the zemindar by the Government, then the zemindar would be entitled to settle the lands with other persons: and it has been argued that from this clause it is clear that the putnidars are entitled to a settlement from the landlords at

the same rent as the amount which was fixed by the Collector under section 49. On behalf of the respondents, this passage has been translated differently, and it is said to mean that if the chaukidari chakran lands be resumed by Government, and if the Government settles the lands with the zemindar, then, if the zemindar offers to settle the same with the putnidar at a given rental, and the putnidar refuses to accept that rental, the zemindar may settle the lands with other persons. It is argued that this means that, if the zemindar after taking settlement makes an offer to the putnidar of a settlement of the lands at a certain rent, and the putnidar refuses to accept that rent, then the zemindar may settle the lands with other persons; that is to say, that under this clause in the lease, the landlords have the option of fixing the amount of rent, and if the defendants do not accept it, the landlords would be able to settle the lands with other persons. Of course, this right of the landlords to settle the lands with other persons would be subject to the right of the plaintiffs to have the settlement concluded on fair and reasonable terms. We have given our best consideration to the passage in question in the kabuliat, and we think that the view taken by the lower Court is correct, and that it does not bind the landlords to settle the resumed chaukidari chakran lands with the putnidars at the same amount at which the assessment for the purpose of the chaukidari tax has been made on the land under the provisions of section 49 of Bengal Act VI of 1870. Apart from this construction which we place on the terms of the lease, we have to add that we have lately held in the case of *Rajendra Nath Mukerjee v. Hiralal Mukerjee** (S. A. 1446 of 1907), that the rent which a landlord is entitled to claim when making a settlement of resumed chaukidari chakran lands with a putnidar, is not restricted to the amount of the assessment made by the Collector under section 49 of Bengal Act VI of 1870, and we have pointed out that this view is supported by principle and by authority. In particular, we referred to the decisions of this Court in the cases of *Hari Narain Mozumdar v. Mukund Lal Mundal* (1) and *Kazi Newaz Khoda v.*

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Ram Jadu Dey (1). The learned pleader for the appellants has made a calculation on the basis of the principle suggested in the former of these two cases, with the result that the extra rent to which the landlords would thus be entitled in the present case comes to Rs. 392-11-2, which is only Rs. 15 less than the rent fixed by the lower Court.

The learned pleader, however, contends that the determination of the question of the amount of rent, which the zemindars are entitled to demand on the settlement, must depend mainly on the terms of the contract between the parties as evidenced by the putni lease or kabuliati. We have already given our reasons for holding that the passage in the kabuliati, relied on by both parties, cannot fairly be construed to mean that the rent must not exceed the assessment made by the Collector. But the learned pleader for the appellants has argued that it is clear, from the terms of the kabuliati, that the putnidars were to have the full benefit of any increase to the profits of the lands covered by the putni lease which might accrue subsequently to the lease, because the zemindars, under the terms of the lease, settled the putni rent at the full amount of the then profits, and in addition took a bonus of Rs. 4,000 from the putnidars. Now, it is clear that the profits from the chaukidari chakran lands were not taken into consideration in determining the rent at the time when the putni was created, and the fact that in respect of the other lands the putnidars agreed to pay as rent the full amount they then were entitled to collect goes rather to support the view contrary to that advanced for the appellants, and to suggest that, if these profits had been included, the full profits would have been demanded as rent. We agree with the lower Court that the evidence of Nilkanta Roy, the son of the original putnidar, is not true, and is worthless. It is impossible to believe him when he says "we took the said putni settlement without any profit on payment of the said sum of Rs. 4,000 as *salami*, considering that, on the resumption of the chaukidari lands, we would get the said lands." The putni lease was given in 1874, and the chaukidari lands were not

resumed till twenty-five years afterwards! It seems to us perfectly clear that, at the time the lease was granted, it was well known that the nominal rents did not represent the actual profits of the putnidars, and this, indeed, is supported by the evidence given by the plaintiffs to prove that no less than Rs. 1,360 has been realized by the putnidars as *salami* for settling a portion only of the resumed lands since their resumption.

The lower Court, in fixing a fair and equitable rent which the zemindars are entitled to demand from the putnidars, has accepted the rent as determined by the Collector at the time of resumption. We have already noticed that that sum exceeds by Rs. 15 only the rental arrived at on the basis of the principle suggested in the case of *Hari Narain Mozumdar v. Mukund Lal Mundal* (1), and, in the circumstances of the case, we see no reason to differ from the lower Court that Rs. 404-8 is a fair and equitable rent which the zemindars, the plaintiffs, are entitled to receive from the defendants for the 201 bighas 14 cottas of resumed chaukidari chakran lands.

We, therefore, confirm the judgment and decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

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INDIAN LAW REPORTS. [VOL. XXXVII.]
CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Holmwood.

1910
April 15.

RAMSEBAK LAL
v.
MUNESWAR SINGH.*

Acquittal—Acquittal under s. 182 of the Penal Code—Subsequent complaint under s. 500, by the person defamed, in respect of the same statement—Subsequent prosecution not barred—Criminal Procedure Code (Act V of 1898) s. 403.

An acquittal under s. 182 of the Penal Code in respect of false information contained in a petition to the manager of an estate is no bar to a subsequent prosecution for defamation under s. 500 of the Penal Code, on the same statements.

Sharbekhan Gohain v. Emperor (1) distinguished.

THE petitioner, Ramsebak, who was a patwari of Janmubhai, submitted a petition, on the 13th October 1909, to the manager of the Bettiah Raj, through Ram Narayan Lal, head tehsildar of Sirsia cutcherry, alleging that Muneswar Singh, Sub-Inspector of Adapur, had wrongfully detained him in the thana lock-up for having given evidence against him in a tree-cutting case, and extorted Rs. 65 before releasing him. The petition was forwarded to the manager, who sent it to the District Superintendent of Police, and an enquiry was thereafter held into the charge and it was found false. The manager then granted sanction under section 195 of the Criminal Procedure Code to prosecute the petitioner under section 182 of the Indian Penal Code. The petitioner was tried for such offence and acquitted on the ground that the section did not apply, the person to whom the information was given not being a public servant, though the Magistrate held that the statements were absolutely false. On the 25th January 1910, Muneswar Singh filed a complaint before Babu H. L. Khastgir, Deputy

*Criminal Revision No. 288 of 1910, against the order of H. L. Khastgir, Deputy Magistrate of Champaran, dated Jan. 25, 1910.

Magistrate of Champaran, charging the petitioner under section 500 of the Indian Penal Code in respect of the petition of the 13th October 1909, and the Magistrate issued a summons on the petitioner to appear before him on the 2nd February to answer the charge. The petitioner, thereupon, moved the High Court and obtained the present rule to quash the proceedings, on the ground that the second trial was barred under section 403 of the Criminal Procedure Code by reason of the acquittal in the first case.

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Babu Dwarkanath Mitter and Babu Manindranath Banerjee,
for the petitioner.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

HARINGTON J. This is a rule calling upon the District Magistrate to show cause why the proceeding which has been instituted against the petitioner should not be stayed on the ground that, under the provisions of section 403 of the Code of Criminal Procedure, the petitioner is not liable to be tried for the offence charged against him.

The proceeding which is now pending against the petitioner is a prosecution for defamation under section 500 of the Indian Penal Code. The petitioner contends that he is protected under section 403, because he has been already tried and acquitted of an offence under section 182 of the Indian Penal Code in respect of the statement now alleged to be defamatory. The facts are that the accused gave a certain information to the manager of the Bettiah Raj which was untrue. He was prosecuted under section 182, but acquitted on the ground that the person to whom he gave the information was not a public servant within the purview of that section. That information was, as a matter of fact, defamatory of the person who was aggrieved in the present case, and it is in respect of the defamatory statements which were made to the manager of the Bettiah Raj that the present charge under section 500 was instituted.

In my opinion, section 403 is no bar to the present proceeding. The present petitioner certainly would not be liable to

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be tried again for the offence of giving false information to a public servant, nor, on the same facts, for any other offence for which a different charge from the one made against him might have been made under section 236 of the Criminal Procedure Code, or for which he might have been convicted under section 237. Section 236 deals with a case in which a single act, or a series of acts, is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, while section 237 provides that, in the case mentioned in section 236, if the accused is charged with an offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it. Neither of these sections applies in the present case. In my opinion, under section 237 it would certainly not have been open to the Court to convict the petitioner, when he was charged under section 182 of an offence under section 500, Indian Penal Code. The one is an offence committed against a public servant, which can only be prosecuted upon the complaint, or under sanction of the public servant injured, or of some one to whom he is subordinate. The offence under section 500 can only be prosecuted on the complaint of the person aggrieved by the defamation. In one case the offence is committed against a person to whom false information is given: in the other case it is committed against a person about whom a defamatory statement is made. The two offences, to my mind, are quite distinct, and the charges under them would have to be prosecuted under the authority of the different persons who are injured by them. The result is that, to my mind, section 403 is not applicable. There is no reason, therefore, to interfere with the proceedings, and the rule must be discharged.

HOLMWOOD J. The question which arises on this rule is whether an acquittal on a charge of giving false information to a public servant under section 182 of the Indian Penal Code, on the ground that the person to whom the information was

given was not a public servant, is a bar, within the meaning of section 403 of the Code of Criminal Procedure, to a trial for defamation under section 500 on the same statements.

It seems to me that the offences under section 182 and section 500 are distinct offences within the meaning of section 233 of the Criminal Procedure Code, and unless they come under any of the exceptions referred to in sections 234 to 236 and 239, the two charges must in law be tried separately. It appears that on the 13th of October 1909 the petitioner submitted a petition to one Ram Narain Lal, head tehsildar of the Sirsia catcherry under the Court of Wards, which holds charge of the Bettiah Raj, making certain allegations against a Sub-Inspector of Police named Muneswar Singh.

These allegations were alleged by the Sub-Inspector to be false, and the said Ram Narain Lal was said to be a public servant. The tehsildar forwarded the petition, which contained a statement that the petitioner Ramsebak Lal had been wrongfully confined by Sub-Inspector Muneswar Singh, and only let off on paying him a bribe of Rs. 65, to the manager of the Bettiah Raj, Mr. Lowis, who sent the petition to the District Superintendent of Police for enquiry. Inspector Udit Narain Singh of the B Circle, after full enquiry, found the petition false and malicious, and requested that the petitioner should be prosecuted under section 182 of the Indian Penal Code "in order to put a stop to the submission of such malicious petitions, which cause an unnecessary trouble, labour, and waste of time of the higher authorities and enquiring officers."

By "enquiring officers" is meant the police, and the footing upon which the prosecution was suggested was that the petitioner intended by his petition to cause the police to do something to the injury and annoyance of the Sub-Inspector Muneswar Singh.

Mr. Lowis gave sanction, under section 195 of the Criminal Procedure Code, to the prosecution of the petitioner under section 182, on the 15th November 1909, on the written request of the Superintendent of Police, and the Court Inspector was ordered, on the 16th November, to apply for the prosecution

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of Ramsebak Lal. The District Magistrate's order on this, dated 16th November 1909, is—"The S. P. (Superintendent of Police) applies for prosecution of Ramsebak Lal under section 182 of the Indian Penal Code. Prosecute Ramsebak : section 182. Issue summons against him. Fix 25th November. Police to send up prosecution witnesses on that date."

It is clear, therefore, that Muneswar Singh, who now seeks to prosecute Ramsebak Lal under section 500 of the Indian Penal Code, did not obtain the sanction to prosecute under section 182 of the Indian Penal Code, and was not the prosecutor, but only the principal witness for the Crown.

If the tehsildar had been a public servant, it is obvious that two distinct offences were committed by the accused in one series of acts so connected together as to form the same transaction, and the case falls under section 235 (1) of the Code of Criminal Procedure, and under no other of the exceptions in sections 234, 235, 236 and 239. That being so, the present prosecution under section 500 of the Indian Penal Code is clearly saved by the express provisions of section 403 (2), and we are bound to discharge this rule. It is further doubtful whether a charge under section 500 could have been added on the trial under section 182 held at the instance of the District Superintendent of Police.

To start a case under section 500, a sworn petition by the person aggrieved on his own initiative would be necessary. Such a petition could hardly be put in by a subordinate Police Officer while he was prosecuting a charge for contempt of the lawful authority of public servants under orders of his superior, the District Superintendent of Police, and in any case there could be no obligation on him to join his personal action under Chapter XXI of the Indian Penal Code with the Crown prosecution under Chapter X.

The ruling in *Sharbekhan Gohain v. Emperor* (1) has no application to the present case, since there both offences were under Chapter X, and although section 201 requires no sanction, it covers the minor offence under section 176, which does

(1) (1905) 10 C. W. N. 518.

require sanction, and, therefore, falls under section 235 (2). Further, there was a finding in the judgment under section 182 that the statements were absolutely false, and the acquittal was solely on the ground that the tehsildar was not a public servant.

Although, therefore, the finding of the Magistrate in the section 182 case cannot be in any way allowed to prejudice the accused in the section 500, Indian Penal Code case, it is clear that the question of malice has not at all been tried, and the accused has not been acquitted of any charge involving malice. That is a question which has to be tried on evidence which would be irrelevant in a trial under section 182 of the Indian Penal Code.

For all these reasons I agree with my learned brother that this rule must be discharged, and that the case under section 500 brought by the aggrieved person, Muneswar Singh, must be tried on its merits.

Rule discharged.

E. H. M.

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APPELLATE CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Doss.*

1910
April 22.

KISHORI MOHAN BOSE

v.

SHEIKH UJIR.*

*Landlord and Tenant—Enhancement of rent by addition of a rent-in-kind—
Bengal Tenancy Act (VIII of 1885) s. 29.*

Section 29 of the Bengal Tenancy Act applies even where a money-rent is enhanced by the addition of a rent-in-kind.

SECOND APPEAL by the plaintiffs.

These two appeals arose out of two analogous rent suits and were tried jointly in both the lower Courts. Both the suits were based on registered *kabuliyats* alleged to have been executed by the defendants in favour of the plaintiffs. The claim in each case was both for money and paddy-rent, *viz.*, money-rents for 1313 B. S. and paddy-rents for 1312 and 1313.

The contention of the defendants was that they did not execute the *kabuliyats*, and that even if they did, they were void as contravening the provisions of section 29 of the Bengal Tenancy Act.

The Court of first instance decreed the suits in full, holding that the defendants did execute the *kabuliyats* and that they had failed to prove that the rents were enhanced by more than two annas in the rupee by the *kabuliyat*. On appeal, the lower Appellate Court found in favour of the defendants, both on the point of fact and of law, and modified the decrees of the first Court. It held, on taking into account both money and paddy-rent as claimed, that the *kabuliyats* contravened the provisions of section 29 of the Bengal Tenancy

* Appeals from Appellate Decrees Nos. 1903 and 1985 of 1908, against the decrees of A. J. Chotzner, Additional District Judge of Mymensingh, dated July 6, 1908, modifying the decree of Taraknath Bose, Munsif of Netrakona, dated Feb. 29, 1908,

Act. In the second appeal to the High Court, it was contended, *inter alia*, that section 29 of the Bengal Tenancy Act "has no application to increase of rent into money-and-produce rent."

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Babu Surendrachandra Sen (with him *Babu Jyotiprasad Sarbadhikari*), for the appellants. Section 29 of the Bengal Tenancy Act is a penal section and ought to be strictly construed. In the absence of any such provision, the rent of an occupancy *raiya* could be enhanced up to any limit by agreement of parties : so this section should be construed in such a way as not to prejudice the rights of a party which, but for such provision, he would have enjoyed. This section speaks of a money-rent, and consequently the enhancement by not more than two annas in the rupee contemplates an enhancement in *money only*. It cannot have any application to an enhancement in both *rent* and *kind*. In the present case, it is not possible to say whether the enhancement in *kind* is by more than two annas in the rupee, for, it is not possible to ascertain what the *money equivalent* of the enhancement in *kind* is ; it is only in a proceeding for commutation of rent under section 40 of the Act that it *may* be possible to say what the *money value* of the enhancement in *kind* would be, and even there the money value of the rent in *kind* need not necessarily be determined, as the prevailing rate of rent of the neighbouring holdings is also taken into consideration.

[JENKINS C.J. But see section 28 of the Act.]

Maulvi N. Ahmed (for *Maulvi R. Zahed*), for the respondent, was not called upon.

JENKINS C.J. This case comes before us by way of second appeal and arises out of a suit brought for recovery of an enhanced rent. The claim was allowed by the Court of first instance, but in the lower Appellate Court it was held that the plaintiffs were only entitled to get the rent and cesses admitted by the defendants. From the decree which followed on that judgment the present appeal is preferred, and it is contended that, having regard to the nature of the enhancement, there was

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no answer to the landlord's claim. The case has been argued before us with considerable ingenuity by Mr. Sen, and what he contends is that section 29 of the Bengal Tenancy Act has no application where a money-rent is enhanced by the addition of a rent-in-kind. The basis of that argument is, and has to be, that section 29 is throughout limited to a money-rent, and that the enhancement on which it places a limit is an enhancement by way of additional money-rent and not by way of an additional rent-in-kind. But this argument overlooks the operation of section 28 which says that, "where an occupancy-raiyat pays his rent in money, his rent shall not be enhanced except as provided by this Act:" and if section 29 does not contemplate the possibility of the enhancement of a money-rent by the addition of a rent-in-kind, it is clear that a money-rent cannot be increased in that way. But assuming that money-rent can be enhanced by the addition of a rent-in-kind, it clearly must be subject to the limit imposed by that clause (b) of section 29. On the finding of the lower Appellate Court in this case, the additional rent does exceed the limit imposed by clause (b), with the result that it is irrecoverable.

On these grounds it appears that the decision of the lower Appellate Court is correct, and that the decree of that Court should be confirmed with costs.

This judgment will govern the other appeal.

Doss J. I agree.

S. M.

Appeal dismissed.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Pugh.

PHILLIPS *v.* PHILLIPS.*

1910
April 26.

Divorce—Attachment before judgment—Divorce Act (IV of 1869) ss. 7, 45—Civil Procedure Code (Act V of 1908), o. XXXVIII, rr. 5, 6—Relief.

An order for attachment before judgment will not be made in divorce proceedings.

Attachment before judgment being a matter of relief and not of procedure, is governed by s. 7 of the Divorce Act and the principles and rules of the English Divorce Court, and not by s. 45 of the Divorce Act and the Civil Procedure Code.

Order XXXVIII, rules 5 and 6, have no application in divorce proceedings.

APPLICATION.

On the 20th April 1910, Carr Lazarus Phillips, a colliery proprietor, filed a petition for the dissolution of his marriage with the respondent, Elizabeth Phillips, on the ground of her adultery with the co-respondent, George William Hyde Batho, a member of the firm of Messrs. Simpson & Co., merchants of Calcutta, praying for the sum of Rs. 1,50,000 as damages against the co-respondent.

It was alleged by the petitioner that on the 31st May 1909 the respondent admitted misconduct with the co-respondent, whereupon he turned her out of the house, but that subsequently, in the month of October 1909, he forgave his wife and took her back. In the month of February 1910, on receiving an anonymous information that the respondent was in the habit of secretly meeting the co-respondent, the petitioner questioned the respondent, who denied the truth of the information. The petitioner thereupon instituted enquiries, but before their completion the respondent left India for England, sailing from Bombay for Marseilles on the 12th March 1910. The co-respondent also left Bombay on the 22nd March, and met the

*Application in Original Civil Suit (Matrimonial) No. 9 of 1910.

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respondent in London in April. Shortly after respondent's departure, the petitioner obtained information that the respondent and co-respondent had frequently, between the 12th January and the end of February 1910, met at 25, Ezra Mansions, which had been reserved by the co-respondent under the name of "Goodall;" and the petitioner charged the respondent with adultery on those occasions.

On the 21st April 1910 the petitioner applied for an order "to restrain the co-respondent from realising his share in the assets of the firm of Simpson & Co., and from selling his shares in the Calcutta Landing and Shipping Company, Limited, and from receiving and removing the sale proceeds of any such shares as may have been sold" on the following materials:—It was alleged that prior to the co-respondent's departure from India, he had despatched a telegram to the respondent, informing her that he was following her, and requesting her to wait for him at Marseilles. The petitioner wired to the respondent on the 6th April, that the co-respondent's telegram had come to his knowledge, and thereupon further telegrams passed between husband and wife. On some date subsequent to the 6th April, the co-respondent cabled to Messrs. Simpson & Co. in Calcutta, intimating that he had severed his connection with the firm, and instructing them to sell all his shares in the Calcutta Landing and Shipping Company, Limited, and to remit the proceeds to him. The shares were being offered in the market for sale. The petitioner contended that the co-respondent had left Calcutta and was endeavouring to dispose of his property and realise and remove his assets with intent to defeat, obstruct, and delay any decree for damages and costs which may be passed against him in the divorce suit.

The application, which was treated as an application for attachment before judgment of the co-respondent's property, was made on the 21st April 1910 by Mr. Knight before PUGH J., and was refused.

On the 26th April 1910, Mr. Hill, on behalf of the petitioner, applied before PUGH J. for a review of his order of the 21st April.

Mr. Hill, for the petitioner. It is true I cannot produce any direct authority where an order for attachment before judgment was made in a divorce proceeding. But on principle, there is nothing to prevent such an order being made. It is expressly provided under section 45 of the Divorce Act that all proceedings in divorce shall be regulated by the Code of Civil Procedure. Hence the portions of the Code (order XXXVIII, rules 5 and 6) which deal with attachment before judgment, become applicable to divorce proceedings. The co-respondent's intent to obstruct or delay execution may be directly inferred from the allegations in the petition. Section 7 of the Divorce Act, which introduces the principles and rules of practice of the English Courts, can have no application to this matter. Section 7 relates only to relief. Section 45 exclusively regulates procedure. An attachment before judgment is clearly a matter of procedure and not of relief.

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PUGH J. In this case an application is made to me to re-consider, either by way of review or as a fresh application with the same object as the former, an order that I made declining to order an attachment before judgment in a divorce proceeding. The application was made at 4-30 P. M. at the rising of the Court, and I then dealt with the matter in a somewhat cursory way, and I refused the application on the simple ground that I never knew of an attachment before judgment in a divorce case. Learned counsel who now appears does not suggest that such an order has ever been made before in divorce proceedings. He argues that the point is one of first impression, and he contends that on principle he is entitled to the order. The argument is founded on section 45 of the Divorce Act, which provides that proceedings under this Act shall be regulated by the Code of Civil Procedure, and he wishes to eliminate from my consideration section 7, which provides that in all suits and proceedings under this Act the High Courts and District Courts shall give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules of the

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Divorce Court in England. It is practically admitted that if section 7 were to apply and bring in English rules and English practice, there would be no warrant for such an application; but Mr. Hill contends that section 45 exclusively regulates procedure: section 7 only relates to relief. He contends that this application is one of procedure only and not of relief, and that to attach a respondent's property before you have got any decree for damages, when it is uncertain whether you will get any damages, is a matter of procedure and not of relief. I would differ with regard to that. I think it is purely a matter of relief to ask to be allowed to seize a man's property without having a decree on the off-chance that you may get a decree hereafter, and it seems to me to have nothing whatever to do with procedure. The way in which a decree is executed, after you have obtained it, is a matter of procedure; but to give one man a right to come to Court before he gets a decree is to confer a right upon him, and that is not procedure. It seems to me that it cannot be successfully contended that by section 45 of the Divorce Act the Civil Procedure Code is to be applied wholesale to the Court when exercising divorce jurisdiction. If this were to be the case, it might also be contended that you could have a Receiver appointed to take charge of the wife, or an injunction against the co-respondent from visiting the wife pending a divorce case. Of course, a petitioner could not have a Receiver of the wife, because she is herself a party to the suit, but offhand, I do not see why, if the Code applied, he should not apply for an injunction. There is much in the Code of Civil Procedure which deals with substantive law and not procedure, and I think these portions of the Civil Procedure Code, order XXXVIII, rules 5 and 6, have no application in divorce proceedings. It is contended that I must infer an intention to defeat and delay the execution of a decree in this suit, from the fact that it was not until the respondent had met the co-respondent in London, when he could have heard of these proceedings, that the orders came out from England to dispose of certain shares. It is suggested that it follows from this that he must be disposing of these shares with intent to

defeat or delay the execution of any decree that may be passed against him. No doubt it may have that effect, but it may be equally consistent with a resolve to make a home with the respondent in England, or elsewhere out of India, and not to return to this country. I am not satisfied as to which of these intents may be in the co-respondent's mind, and therefore I do not find the facts proved, which are essential to support an order. There would be one advantage from this application if it were successful, and that is, the Court would have it in its power to compel the co-respondent to make a settlement of any damages which might be awarded on the lady. That is practically the only result that could happen, and the co-respondent and the respondent appear to have taken matters into their own hands by practically going off together. I do not really think that this application is dictated by any particular desire on the part of the petitioner in that way: I think it is dictated by the usual and very natural annoyance and irritation which a man feels when another man runs away with his wife. I notice from the petition, the petitioner is described as a colliery proprietor, and one cannot eliminate from one's mind the knowledge that he is, as a matter of fact, a very rich man. The question of costs cannot be of any possible moment to him one way or the other. If he is anxious to provide for his wife's future, or make a provision for her, he can well afford to do so. I, therefore, decline to alter my former order, or to make a fresh order. I would add, that in the observations I have made with regard to the respondent and co-respondent, it must not be taken that I come to any finding as to the actions of the respondent or co-respondent; they may of course have a complete answer. I am only dealing with the case as it is put before me in argument by the petitioner.

Application refused.

Attorneys for the petitioner: *Leslie & Hinds.*

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SPECIAL BENCH.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Doss
and Mr. Justice Teunon.*

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May 10.

EMPEROR

v.

TRIPURA SHANKAR SARKAR.*

Sanction for prosecution—Witness—False statement before the committing Magistrate retracted, and true evidence given, at the trial—Contradictory statements—Consideration of circumstances under which false evidence was given and repudiated—Criminal Procedure Code (Act V of 1898) s. 195.

It would be dangerous to hold that the mere fact of contradictory statements having been made by a witness would justify the Court in granting sanction to prosecute him for giving false evidence. It is necessary to consider the circumstances under which they were made and repudiated.

Where a witness was arrested and, after pointing out the spot where the stolen property was concealed, as alleged, by one of the accused, was released, but stayed with the police and was examined the next day in Court, before the date fixed for the hearing of the case, the question having been put by a police officer in violation of section 495 of the Criminal Procedure Code, and the evidence so given was false and was retracted at the trial, when he gave true evidence, alleging that he had been tutored and threatened by the same officer before his deposition in the lower Court :—

Held, that having regard to the events leading up to the examination before the committing Magistrate, the conditions under which it was conducted, and the fact that the witness did not persist in his false statements but gave true evidence at the trial, sanction should not be granted.

THIS was an application by the Advocate-General, at the instance of the Deputy Inspector-General of Police, for sanction, under section 195 of the Criminal Procedure Code, to prosecute Tripura Shankar Sarkar for giving false evidence in the following circumstances.

In the early morning of the 28th October 1909, a dacoity was committed at the house of one Kaluram Agarwalla, a cloth merchant, at Haludbari Bazar, in the subdivision of Kushtea, and was followed immediately after by another dacoity at the shop of one Sitanath Saha, a short distance away. Sailendra Kumar Das and nine others were arrested in connection with

* Application for sanction to prosecute under s. 193, Indian Penal Code.

these dacoities and placed before Mr. Ezechiel, the District Magistrate of Nadia, who held an inquiry against them under section 3 of Act XIV of 1908. Tripura was arrested by Inspector Nishi Kanto Banerjee on the 15th December, and on the next day was taken by Nishi Kanto and a Police Superintendent, to the village of Belesishi, and he was said to have pointed out a spot under a tree where the property stolen at the dacoities was found buried. He was thereupon released, but accompanied the police to the Mirpur thana and stayed with them till he gave evidence. He was examined before the Magistrate on the 17th, though the case was not fixed for hearing on such date, and gave evidence connecting the accused Bidhu Bhusan Biswas with the concealment of the property. The Magistrate ultimately committed the ten accused to the High Court under sections 395 and 397 of the Penal Code.

The trial of these persons before a Special Bench constituted under section 11 (1) of Act XIV of 1908, and consisting of Jenkins C.J. and Doss and Teunon JJ., commenced on the 4th April 1910. Tripura was examined on the 11th as a witness for the Crown, when he resiled from his previous statements made before the committing Magistrate, alleging that they were false and were made at the suggestion of the Superintendent by whom he was tutored and threatened. He further stated that his deposition was taken by the Magistrate in the presence only of the Superintendent who put the questions to him, and that it was not read over or explained to him by any one, though he admitted having signed it. Three of the accused were acquitted, and seven, including Susil Kumar Biswas who had pleaded guilty, were convicted and sentenced by the Special Bench to various terms of imprisonment.

An application was then made before the learned Judges composing the Special Bench, who subsequently sat as a Bench specially constituted to hear the same. The petition on which it was based contained the following assignments of perjury:—

(i) That, on the 17th December 1909, Tripura Shankar Sarkar was examined as a witness for the Crown at the inquiry before the District Magistrate, and stated as follows:—“*Susil asked me whether I knew where the things were kept*”—while, on the 11th April 1910, when examined as a prosecution witness before

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the Special Bench, he stated, in answer to the question whether he had not said so to the District Magistrate, "*No, Susil did not ask me that;*" one of which statements he either knew or believed to be false, or did not believe to be true.

(ii) That he stated in the course of the said inquiry on the same date "*He (meaning thereby Bidhu Bhusan Biswas) brought out a small earthen vessel, the mouth of which was covered with a white cloth,*" and, on the 11th April 1910, at the trial before the Special Bench, he stated, "*I did not see him bringing out any such earthen vessel;*" one of which, etc.

(iii) That on the 11th April 1910, when examined before the Special Bench, he stated as follows:—"*It (meaning thereby his deposition before the said Magistrate) was not read over or explained to me;*" and further, in answer to the question, "*You see that it is written by the Magistrate 'read over to the witness in Bengali and explained to him,'*" he stated in evidence "*This is false. He never read it to me*" which statements he either knew or believed to be false, or did not believe to be true.

The Advocate-General (Mr. Kenrick, K.C.) instructed by Mr. Hume, Public Prosecutor, for the Crown.

JENKINS C.J., DOSS AND TEUNON JJ. An application has been made to us by the Advocate-General, under section 195 of the Criminal Procedure Code, for sanction to prosecute Tripura Shankar Sarkar under section 193 of the Indian Penal Code.

The application is based on a petition presented, apparently, at the request of the Deputy Inspector-General of Police, and the Advocate-General has relied solely on the allegations contained in that petition and has placed before us no other materials. But it would be a very inadequate treatment of the case were we to dispose of it on these allegations alone, and to arrive at a just determination other matters must be considered. It may be conceded that a comparison of Tripura's deposition before the committing Magistrate with his evidence given in this Court, discloses contradictory statements; but it would be a dangerous doctrine to hold that this alone would justify us in granting a sanction to prosecute for giving false evidence. It is necessary for us to consider how it has come about that there are these contradictions, and how it is that Tripura has resiled in this Court from the statements he made before the Magistrate.

Tripura was examined as a witness before us, and we are thus in the best possible position for the purpose of appreciating the truth of what he stated before us.

After careful consideration of his evidence, and bearing in mind all that we observed when he was in the witness box, we have no doubt that in relation to the matters now in question he gave in the main a true version in this Court and a false one before the Magistrate.

What, then, is the explanation of this? A bare narrative of the facts as disclosed by the evidence given before us will best furnish the answer as to how Tripura came to give false evidence before the Magistrate, directed to establishing the guilt of his friend and host, the accused Bidhu Bhusan Biswas.

Tripura was arrested by Inspector Nishi Kanto Banerjee on the 15th December at 5 P.M., and on the next day he was taken by Nishi Kanto and a Superintendent of Police to the village of Belesishi, and then, according to the prosecution theory, he pointed out the place where he was supposed to have seen the accused Bidhu conceal the property. After the property was found, he is said to have been released from custody at this same village, and the form was observed of taking from him a bond to appear and give evidence. But in spite of the release and notwithstanding the bond, Tripura adhered to the police and went back with them to the Mirpur thana and stayed with them till he gave his evidence. This he did on the 17th, and he was then examined before the committing Magistrate, notwithstanding that the case before the Magistrate was at that time standing adjourned to the 20th, and the 17th was not a day fixed for hearing. The only explanation Inspector Banerjee could give of this was, "I thought it better." Up to this point we have narrated that which rests on police evidence.

We will now take up Tripura's story. The only persons present at the examination besides Tripura were the committing Magistrate and the Superintendent, and the prosecution at this stage was conducted by the Superintendent in the sense that he examined the witness. We would here point out that if this be true, the examination of Tripura was in breach of the provisions of section 495 of the Criminal Procedure Code, for there can be no question that the Superintendent

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had taken part in the investigation of the offence. What is stated by Tripura beyond this is contradicted by Inspector Banerjee. Tripura declares that while he was at the Mirpur thana he was tutored by the police, and that he gave the answers he did before the Magistrate, because he was told by the Superintendent that he would have to give his answers as the Superintendent put his questions. Inspector Banerjee denies the tutoring, and there the matter rests. This, then, is how matters stand. The Court is convinced that of the contradictory statements now under consideration those made in this Court were true, but those before the Magistrate were false; and on a careful consideration of the events leading up to the examination before the committing Magistrate, and of the conditions under which that examination was conducted, we are clearly of opinion that the sanction sought should not be given. Had Tripura repeated here the false story he told before the Magistrate, no such application as the present would have been made: is it to be granted because he had told the truth here? Certainly not.

We do not mean to say that in no case would it be right to grant a sanction when a witness has told a false story before the committing Magistrate and a true story at the trial; there may be exceptional conditions in which sanction should be granted, but we are clear that to give sanction in circumstances such as we have here would only tend to defeat, and not to further, the ends of justice.

So far we have dealt with the application as based on Tripura's conflicting statements; but sanction is also sought for his prosecution in respect of his statement that the deposition was not read over to him. The Advocate-General, however, has not placed before us any affidavit or other material that would justify us in holding that in this respect Tripura had given false evidence. The result then is that we must decline to give the sanction sought, and we must dismiss the application.

PRIVY COUNCIL.

CASSIM AHMED JEW A

v.

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P.C.*
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March 8, 9.

[On appeal from the Chief Court of Lower Burma, at Rangoon.]

Privy Council, practice of—Dismissal of appeal with costs—Alteration of decree appealed from in respondents' favour without cross-appeal by them.

In a suit on a promissory note for Rs. 16,042 principal, and interest at $1\frac{1}{2}$ per cent per mensem, and also for interest "on the decree from the date of the institution of the suit until realisation," the first Court passed a decree for only Rs. 500 "with interest as prayed." The Chief Court of Lower Burma ordered that "the decree of the Original Court be altered to a decree for the full amount claimed," and said nothing about interest. The plaintiffs (respondents) applied by petition to the Chief Court to amend its decree by adding a specific statement that "interest as prayed for in the plaint" was payable on the decretal amount, but the application was dismissed. The defendant appealed to the Privy Council, and shortly before the case came on for hearing, the respondents petitioned for special leave to enter a cross-appeal so far as the decree of the Chief Court had failed to include interest after the institution of the suit. A consent order in Council was made on 5th March 1910 that the respondents should have leave on the hearing to appeal on the question raised in their petition, and their Lordships, while dismissing the appeal, altered the decree of the Chief Court as prayed in the petition without a cross-appeal being entered.

APPEAL from a decree (21st May 1906) of the Chief Court of Lower Burma, at Rangoon, on its Appellate Side, which varied a decree (30th June 1905) of the same Court on its Original Side.

The second defendant obtained leave to appeal to His Majesty in Council.

The suit out of which this appeal arose was brought by the respondents against the appellant and his brother, Hashim Ahmed Jewa, as makers of a promissory note payable on demand for Rs. 15,000 with interest at $1\frac{1}{2}$ per cent. per mensem,

* Present: LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON and MR. AMEER ALI.

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which had been given on 22nd January 1904 in consideration of a loan to Hashim Ahmed Jewa, the first defendant in the suit, in which it was sought to recover principal and interest amounting in all to Rs. 16,042-8. The plaint also prayed for interest on the principal from the date of the institution of the suit until decree, and on the amount decreed until realisation.

The suit was brought on 19th August 1904, shortly before which date the first defendant had been adjudicated an insolvent and had absconded : he did not appear to defend the suit.

The second defendant made various defences, but the main contest in the suit was as to whether certain sums amounting to Rs. 14,400 had been paid by Hashim Ahmed Jewa to the plaintiffs, and specifically appropriated by him towards satisfaction of the promissory note in suit.

The Original Court (BIGGE J.) found that issue in the defendant's favour and made a decree for only Rs. 500, with interest at $1\frac{1}{2}$ per cent. per mensem from the date of the institution of the suit till realisation as prayed in the plaint, and also for costs on the sum decreed.

The Appellate Court (C. E. FOX, Offg. C.J., and HARTNOLL J.) on appeal by the plaintiffs ordered that "the decree of the Original Court be altered to a decree against both defendants for the full amount claimed." Nothing was said about interest.

The defendant petitioned the Chief Court for leave to appeal to the Privy Council, but the application was refused ; and special leave to appeal was granted by His Majesty in Council on 26th March 1907.

On 25th April 1907 the plaintiffs applied to the Chief Court by petition, stating that their decree had been transferred to the District Court of Amherst for execution, and that the Judge of that Court had refused to allow interest on the ground that it was not allowed by the Appellate Court's decree ; and submitting that, taken in conjunction with the decree in the Original Court, the judgment of the Chief Court amounted to an order that the sum of Rs. 500 in the original decree was to be altered into a sum of Rs. 16,042-8, and that there was nothing in the judgment of the Chief Court providing that the

provision in the original decree for payment of interest was to be reversed or set aside; and the plaintiffs prayed that under the provisions of section 206 of the Civil Procedure Code (1882) the Chief Court would amend its decree by setting out specifically that interest was payable on the decretal amount.

In dismissing that application the Chief Court said: "We do not think that the omission of mention of interest in the Appellate Court's judgment and decree can be regarded as a clerical error, or that the judgment necessarily implied that the decree would carry the contract rate of interest on the principal sum."

Shortly before the appeal came on for hearing, the respondents petitioned His Majesty in Council for special leave to enter a cross-appeal, so far as the Chief Court's decree failed to include interest after the institution of the suit. A consent order in Council was made on 5th March 1910 that the respondents should have leave on the hearing to appeal on the question as to interest subsequent to the institution of the suit raised in their petition. No cross-appeal was entered. The respondents in their case submitted that the appeal should be dismissed, and the decree of the Chief Court varied by allowing the respondents interest from the date of suit to decree, and from the date of the decree until payment.

Roskill, K.C., and *J. W. McCarthy*, for the appellant.

De Gruyther, K.C., and *E. U. Eddis*, for the respondents.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is a pure question of fact. Their Lordships see no reason to disturb the judgment of the Court from which the appeal is brought.

It does not appear to their Lordships necessary to go into the affirmative case made by Mr. De Gruyther. It is enough to say that in their Lordships' opinion the judgment of the Chief Court of Lower Burma is right, and their Lordships agree with it for the reasons which they have given, and which it is not necessary for their Lordships to repeat.

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With reference to the two clerks, their evidence is not sufficient to support the defendants' case. The evidence is extremely weak. They say it is customary to endorse on a promissory note the payments made on account. There is no endorsement on the promissory note, and there is no corroboration of their statement, which is positively denied on the other side.

Their Lordships will, therefore, humbly advise His Majesty that the appeal must be dismissed. The appellant will pay the costs of the appeal.

The judgment of the Chief Court will be amended by the providing for interest subsequent to the decree in accordance with the prayer of the petition presented by the respondents.

J. v. w.

Appeal dismissed.

Solicitors for the appellant : *Bramall & White.*

Solicitors for the respondents : *Sanderson, Adkin, Lee & Eddis.*

LETTERS PATENT APPEAL.

*Before Sir Lawrence H. Jenkins, K.C.I.B., Chief Justice,
 and Mr. Justice Doss.*

BANESWAR MUKHERJI

v.

UMESH CHANDRA CHAKRABARTI.*

1910
 April 29.

Kabuliyat, construction of—Rent, partly in money and partly in kind—Fixed rent—Evidentiary value of later documents between different parties in construing an earlier one.

Where the terms of a document clearly point to the fact that the rent is to be partly in money and partly in kind, the rent cannot be regarded fixed in amount, even though the *kabuliyat* is a *mokarrari* one, and in the original deed the two items of rent in kind and rent in cash were lumped up and expressed as a consolidated money-rent.

An earlier document cannot be construed by reference to a later document which is not between the same parties.

* Letters Patent Appeal, No. 79 of 1909, in Appeal from Appellate Decree No. 1083 of 1908.

APPEAL by the plaintiffs, Baneswar Mukherji and another.

The defendant was a tenant under one Musammat Parbati Debi of a certain *mokarrari* tenure in respect of which a *kabuliyat* was executed in December 1900. The tenure was subsequently mortgaged by the lady to the plaintiff as security for the payment of Rs. 43, being the interest due on a loan made by her. The plaintiffs, as mortgagees in possession, sued the defendants for arrears of rent in respect of the year 1313, and obtained a decree at a modified rate in the Court of first instance. The plaintiff claimed rent on the basis of the original registered *mokarrari kabuliyat* that had passed between the lady and the defendant, her tenant. The relevant portion of the *kabuliyat* ran as follows :—

“ I (Parbati Debi) make a settlement with you (Umesh Chandra Chakrabarti) on an annual rent of Rs. 12-14 to be paid in cash and 40 maunds of paddy of which the value is Rs. 37 in all, on a rent of Rs. 49-14 settled in perpetuity. On taking from you a bonus of Rs. 200, you shall furnish me with paddy in the month of *Paus* every year, and out of the cash rent of Rs. 12-14, you shall pay Rs. 4-6, the revenue for one *anna* share of *mauca* Gobindapur and *chaukidari* tax of Rs. 1-8 and Re. 1 for Doorgamata, and the balance, Rs. 6, to me.”

The plaintiff claimed the cash rent with the then market value of the 40 maunds of paddy. The Court of first instance gave a decree at the rate of Rs. 49-14, holding that the lease contemplated a fixed rent. On appeal, the Judicial Commissioner reversed the judgment and decree of the first Court and decreed the suit fully. The defendant preferred a second appeal to the High Court, and Carnduff J., sitting singly, restored the judgment and decree of the first court.

The plaintiff, thereupon, preferred this appeal under section 15 of the Letters Patent.

Babu Kshettramohan Sen, for the appellant. The terms of the *kabuliyat* are clear. It stipulates for 40 maunds of paddy or its value, plus the cash rent. The plaintiff is entitled to realize 40 maunds of paddy or its present value. As regards the statement in the *kabuliyat* of the cash rent of Rs. 49-14, it must have been so stated for the purpose of valuation for stamp-duty and registration at the time. A subsequent deed

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between strangers should not be allowed to explain a previous one.

Babu Jadunath Kanjilal, for the respondent. The lease in question was a *mokarrari* lease, and that of itself indicates that fixed rent was in the contemplation of the parties. Moreover, the rents in cash and in kind were consolidated by the terms of the lease into a lump sum of Rs. 49-14, and this also points to rent in cash fixed in perpetuity. The subsequent mortgage-deed confirms this impression as regards the intention of the parties, and this is further evidenced by the fact that in a previous rent-suit the plaintiff claimed rent at the rate stipulated, though the price of the paddy at the time was very high.

JENKINS C.J. In my opinion the construction placed by Mr. Justice Carnduff on the *kabuliyat*, which forms the basis of this suit, is erroneous. The terms of that document clearly point to the fact that the rent is to be as to part in money and as to part in kind, and this is emphasized by the express provision relating to the delivery of paddy in the month of *Paus* every year. I think it is impossible to read the document otherwise than as it has been read by the learned Judicial Commissioner. It is quite true that the paddy has a money-value attributed to it; but that is explicable by the desirability of stating that amount for the purpose of fixing the stamp-duty. The learned Judge, from whose decision this appeal is preferred, appears to have been influenced in his construction of the document by a mortgage subsequently executed in favour of the plaintiffs by the original grantor of the *mokarrari* tenure. But no canon of construction would allow the Court to construe an earlier document by reference to a later document which is not between the same parties.

The result then is, that in my opinion this appeal must be allowed, the decree of Mr. Justice Carnduff set aside and that of the Judicial Commissioner restored, with costs of the hearing before Mr. Justice Carnduff and before this Court.

Doss J. I agree.

S. M.

Appeal allowed.

REFERENCE BY THE BOARD OF REVENUE.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice. Mr. Justice Doss
and Mr. Justice Chatterjee.*

In re PARASEA COLLIERIES, LD.*

1910
June 2.

*Stamp-duty—Lease—Multifarious Document—One lease with several parties
concurring to it—Stamp Act (II of 1899) ss. 5, 28 (2), 35, 57 (1).*

The concurrence of several parties to one and the same lease does not make it a multifarious document within the meaning of section 5 of the Stamp Act.

The stamp-duty on such a lease is the same as on a conveyance for a consideration equal to the amount or value of the fine or premium for which the lease is granted.

REFERENCE by the Board of Revenue.

The material portion of the reference was as follows:—

“2. The parties to a deed, dated 30th April 1908, in respect of which adjudication of stamp duty is desired, are as follows:—

- (1) Mr. C. C. Kilburn, described as ‘the Trustee.’
- (2) The Raneeganj Coal Association, Limited, in liquidation, referred to as ‘the old Company,’ and Messrs. W. H. Cheetham and C. C. Kilburn, the Liquidators of that Company, referred to as ‘the Liquidators.’
- (3) The Raneeganj Coal Association, Limited, an apparently existing Company, referred to as ‘the Association.’
- (4) Messrs. C. W. Wallace and others, members of the firm of Shaw, Wallace and Company, together referred to as ‘the Firm.’
- (5) The Parasea Collieries, Limited, referred to as ‘the Company.’

“3. From the recitals it appears that a former Company, by a deed dated the 1st September 1891, granted and assigned to Messrs. C. C. Kilburn and S. Dignam, their executors, administrators and assigns, as security for the repayment of debentures to the amount of Rs. 3,00,000 issued by the former Company, certain lands including those forming the subject of the deed under consideration, to hold the same so far as such premises were rent-free and freehold, absolutely, and such of the premises as were not rent-free and freehold and were held perpetually or under *mokarrari* leases, for the term of 999 years, and such of the premises as were held for a fixed term or for a terminable period, for all the residue then to come of such term or period, and subject, as to all the said premises, to the trusts declared by the said deed of and concerning the same. Of the above trustees only one is now surviving, Mr. S. Dignam having died in the year 1893.

* Reference by the Board of Revenue under s. 57 (1) of the Indian Stamp Act, 1899.

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"4. Before the debentures secured by the above-mentioned deed were paid off, the old Company went into liquidation, and, by its winding up resolution, the liquidators were authorised to enter into an agreement with the Association (then about to be incorporated) for the sale to the Association of the old Company's undertaking, business and assets. An agreement was accordingly entered into on the 14th November 1899, between the old Company and the Liquidators of the one part and the Association of the other part, whereby it was agreed that the old Company should transfer, and the Association should take over, as a going concern, subject to the debentures, all and every the property of the old Company including the lands comprised in the trust deed of the 1st September 1891. It appears that no formal transfer was ever executed in terms of the agreement, but the Association was, at the time of the signature of the agreement, put into possession of the property agreed to be transferred, and thereafter remained in possession as owners thereof.

"5. Subsequently the debentures were discharged, presumably with the funds of the Association, though this fact is not stated in the deed. No reconveyance of the property comprised in the Trust Deed was, however, ever effected.

"6. The deed goes on to recite that the Association had lately agreed with the Firm for the transfer to them or their nominees of the coal and the coal mining rights in and under the lands described in the first and second schedules to the deed for the price of Rs. 5,04,702 for the period, and subject to the rent and royalties and the terms and conditions thereafter appearing in the deed. Further, that the Firm had since agreed with the Company to transfer to the Company all the mining rights, etc., so agreed to be granted to the Firm in manner and subject as aforesaid, for the sum of Rs. 5,50,000. It is further recited that the trustee and the old Company and the Liquidators had at the request of the Firm consented and agreed to join in the deed for the purpose of more effectually assuring the premises thereby demised and vesting the same in the Company.

"7. The operative part of the deed, which follows, is in these terms :—

'Now this Indenture witnesseth that in pursuance of the said agreement and in consideration of the sum of Rs. 5,04,702 paid by the Company to the Association at the request of the Firm, and of the sum of Rs. 45,298 paid by the Company to the Firm on or before the execution of these presents (the receipt of which several sums of Rs. 5,04,702 and Rs. 45,298, they, the Association and the Firm, do hereby respectively admit and acknowledge) the Trustee at the request and by the direction of the Association hereby grants leases and demises and the old Company and the Liquidators at the like request and direction do and each of them doth hereby grant lease and confirm and the Association at the request and by the directions of the Firm doth and the Firm doth hereby grant lease and confirm unto the Company all and singular the mines, veins, seams or beds of coal lying or being in or under all those the lands, etc., To have and to hold the premises hereby demised unto the Company for the term of 999 years as from the 20th February last past from which date the Company entered into actual possession of the demised premises, subject nevertheless to determination as hereinafter is mentioned, and to the payment of the rents and royalty hereinafter reserved and also subject to the terms and stipulations and conditions hereinafter contained.'

"8. The deed comprises covenants on the part of the Company as lessee and on the part of the Association as lessor, and no covenant or stipulation is entered into by any other of the parties to the deed.

"9. The Company covenants with the Association, *inter alia*—

(i) to pay to the Association a fixed royalty of five annas on every ton of coal raised and despatched and on every ton of coke manufactured and despatched from the mines lying under the lands described in the first Schedule, and also, in the event of such royalty in any year not amounting to Rs. 15,000, to pay to the Association the amount by which the royalty may fall short of that sum.

(ii) in respect of the mines under the lands described in the second Schedule, and the surface and other rights therein demised by the deed to pay to the Association an annual rent of Rs. 2,000.

"10. The Board in their order of the 19th November 1908 (disagreeing with the Government Solicitor and agreeing with the Collector of Stamp Revenue, Calcutta, and with the Advocate-General) held that the document in question is a multifarious document within the meaning and application of section 5 of the Stamp Act. The document appeared to the Board to embody two simultaneous leases by the Association to the Firm and by the Firm to the Company. The Board could not accept the argument that that portion of the document which sets forth the lease by the Association to the Firm is a mere recital. On the contrary, they held that the lease by the Association is as definitely set forth as the lease by the Firm, and that is definitely set forth, also, that the sum of Rs. 5,04,702 is the price paid for this lease. The arrangement that the Company shall pay the sum to the Association, and that it shall pay to the Firm the difference only between this sum and a five and a half lacs, did not seem to the Board to make the two transactions one transaction; this mode of payment was merely an arrangement of convenience. In this view the Board decided that the document should be stamped as follows:—

As a lease between the Association and the Firm under Article	Rs.
35 (b)	5,050
As a lease between the Firm and the Company under Article	
35 (c) with inclusion of rent and royalty	5,720
TOTAL.	10,770

"11. The Company having expressed a wish to be heard against this order, the Board gave a hearing to learned counsel on their behalf. Briefly stated, the argument used before the Board was that there is only one transaction in the operative portion of the deed of the 30th April 1908, *viz.*, the lease to the Company of a single property, and in this lease other persons join and confirm according to their respective interests. It is argued that mere recitals showing why consent of several parties was considered to be necessary cannot be held to be operative. The deed recites that there was an agreement between the Association and the Firm, but that agreement, it is argued, never matured. Only the Company, it is urged, has any cause of action in this deed.

"12. The Board were asked, if they do not see their way to reviewing their order of the 19th November 1908, to refer the case to the Hon'ble High Court under s. 57 (1) of the General Stamp Act of 1899. The Board adhere to their

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opinion that the deed comprises distinct matters, *viz.*, a transfer from the Association to the Firm and from the Firm to the Company, and they think therefore that it should be stamped as directed in their order of 19th November 1908.

"13. In consideration, however, of the importance of the case and the advantage of obtaining an authoritative decision, the Board decide to make this reference to the Hon'ble High Court."

The Advocate-General (Mr. Kenrick, K.C.), in support of the reference.

Mr. Buckland, for the Parasea Collieries, Limited, was not called upon.

JENKINS C.J. This reference under section 57 (1) of the Indian Stamp Act of 1899 has been placed before us by the learned Advocate-General, who has said all that could be legitimately urged on behalf of the view asserted by the Board of Revenue; but he has failed to convince us. The facts are simple. The document which has been placed before us for adjudication is a lease for 999 years, which recites at length the previous title and a succession of agreements in relation to the properties comprised in it. The leased properties were at one time vested in the Raneegunge Coal Association, Ltd., but to secure a debenture loan they were assured to trustees, of whom C. C. Kilburn alone is now alive. Though the debenture loan has been discharged, there has been no reconveyance. The Company went into liquidation in 1899, but merely for the purpose of reconstruction, and on this reconstruction an agreement was made for the transfer to another Company, bearing the same name, and in the reference called the Association. Then there was an agreement by the Association to transfer the coal mining rights in and under the properties to Messrs. Shaw, Wallace & Co. for the price of Rs. 5,04,702 for the period and subject to the payment of the rent and royalties expressed in the lease now under consideration. Finally, Messrs. Shaw, Wallace & Co. agreed with the Parasea Collieries, Ltd., to transfer to it all these mining and other rights subject to the same conditions for the sum of rupees five lacs and fifty thousand. To carry this last agreement into effect, it was thought

desirable to have the concurrence in the lease (i) of Mr. C. C. Kilburn, the surviving trustee of the debenture loan in whom the property is still vested, (ii) of the old Company and its liquidators, (iii) of the Association, and (iv) of Messrs. Shaw, Wallace & Company; but this did not alter the character of the lease or the nature of the transaction. The view of the Board would appear to be that "The document is a multifarious document within the meaning and application of section 5 of the Stamp Act." Now, that section provides that "any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under the Act." But here there is only one lease, and that is so, though the concurrence of several parties may in the circumstances have been proper; and (in my opinion) there is no justification for treating the instrument as a double lease, and this is so whether regard be paid to the ordinary principles of conveyancing or the terms of the Act.

This is expressly recognised in relation to a sub-purchase in section 28 (3). But it is said that this section does not apply, because here we are concerned with a lease and not with the conveyance. The Article that applies to the lease is the 35th, and so far as the payment of a fine or premium is concerned, it provides that the lease shall bear the same duty as a conveyance for a consideration equal to the amount or value of such fine or premium. But the fine or premium for which this lease is granted is the sum of Rs. 50,500 payable by the Parasea Collieries, Ltd., and that alone, therefore, is the premium on which stamp-duty is payable. I therefore hold that the claim made by the Board of Revenue for the stamp-duty on this instrument as a lease between the Association and Messrs. Shaw, Wallace and Company cannot be sustained, and I would so answer the reference. I have not considered or dealt with any matter beyond that referred.

DOSS AND CHATTERJEE JJ. concurred.

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REFERENCE BY THE BOARD OF REVENUE.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Doss
and Mr. Justice Chatterjee.*

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June 8.

*In re BURN & CO.**

Stamp-duty—Money received by servant of a firm and handed over to fellow-servant—Consideration—Acknowledgment of receipt by fellow-servant of a sum larger than Rs. 20, if liable to stamp-duty—Stamp Act (II of 1899), s. 2 (23), Sch. I, Art. 53

Where a sum exceeding Rs. 20 was received by an assistant in a mercantile firm from the cashier of the firm as advance made on the firm's behalf, and to be expended on the firm's behalf, and previous to disbursement of the sum in question a pay-order was made out by the Accounts Department of the firm and was sent to the cashier who had paid the sum to the assistant, and the assistant at the same time acknowledged receipt by signing his name or initials on the pay-order:—

Held, that the acknowledgment did not require a receipt-stamp by reason of the assistant's signature on the pay-order.

Attorney-General v. Carlton Bank (1) distinguished.

REFERENCE by the Board of Revenue.

The statement of case was as follows:—

“Sums exceeding Rs. 20 were received by four assistants of the firm of Messrs. Burn and Company from the cashier of the firm as advances made on the firm's behalf, and to be expended on the firm's behalf on account of export charges, (i.e., freight, cooly hire, etc., for material despatched), purchase of postage stamps, expenses of a journey undertaken for the firm's work, and cost of erection of certain sheds.

Previously to disbursement of the sums in question, pay-orders were made out by the Accounts Department of the firm and were sent to the cashier, who paid the sums to the assistants. At the same time the assistants acknowledged receipt by signing their names or initials on the pay orders, in some cases also writing the word “Received” on the pay order.

Stamps were not affixed on these documents.

Proceedings were initiated by the Collector of Stamps, Calcutta, against the four assistants on the ground that they had given receipts for money which should have been stamped under the Stamp Law. It was contended on their behalf that the moneys were not paid to them for their personal use, but that

*Reference by the Board of Revenue under s. 57 (1) of the Indian Stamp Act, 1899.

(1) [1899] 2 Q. B. 158.

the payments were made without consideration, and were, therefore, exempt from stamp-duty under Exemption (b) to Article 53 of Schedule I of the General Stamp Act. The Collector, however, held that the payments had not been made without consideration. He was of opinion that the words 'without consideration' used in the Exemption in the Act apply only to such payments as are made from natural love and affection, or voluntarily as gifts, gratuities and the like. In lieu of prosecuting before a Magistrate under s. 70 (2) of the Stamp Act, he allowed composition, on payment of penalties, of the offences which he held had been committed against the Act.

The cases were then brought to the notice of the Board of Revenue, who referred them for the opinion of the Law Officers of Government. The Law Officers advised that the documents in question were receipts within the definition contained in s. 2 (23) of the Stamp Act, and that the payments for which the receipts were given were not made without consideration. They advised that the consideration for which the receipts were given may probably be taken to be a promise by the payees that they would employ the money paid in the business, or for the purposes, of their employers, the payers, or some consideration of the same nature. The receipts were clearly meant to be acquittances, and unless such a promise, as above indicated, can be considered as implied, the payers could not afterwards be called upon to account for the moneys. Such a promise, it was argued, is clearly a good consideration in law.

The Board accepted the opinion of the Law Officers.

Opportunity, however, was afterwards afforded by the Board to Messrs. Burn & Co. for argument of the case, as it has been urged, on their behalf, that before the payments were made there was no legal obligation in respect of these payments as between Messrs. Burn & Co. and their assistants, and that the acknowledgments given by the assistants cannot, therefore, be held to be acquittances; that the payment of the money conferred no benefit upon the assistants; that the contract or consideration was unilateral; that there was no consideration so far as the Company is concerned. The undertaking was by the assistant to use the money, and account for it. There was no acquittance of the cashier, as the cashier might have paid against order, or without authority. The cashier is merely the agent of the firm. The payments were purely voluntary payments of the firm's money; they were merely a transfer from one department to another department of the office, and the receipts are merely a part of the machinery of the firm's office. The case of *Attorney-General v. Carlton Bank* (1) was cited, and attention was called to the judgment of Lord Chief Justice Russell, and to the statement made on behalf of the Crown in that case, to the effect that the multiform invoices used in large shops, for the purpose of identifying the particular clerks through whose hands money passes, do not require to be separately stamped (under English law), because they are not intended as a discharge to the respective clerks, and are not retained in their possession, but are intended merely to simplify the business of book-keeping.

On the other hand, the learned Government Solicitor also relied on the English case quoted as a clear and strong authority (i) that the documents

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in question are receipts within the meaning of the Stamp Law, and (ii) on the question of intention of the Legislature. He urged that the judgment in the English case laid down in very clear and emphatic terms that no special canons of construction should be applied to a revenue or taxing Act, and that the intention in construing such, as all other Acts, must be gathered from the "language employed, having regard to the context in connection with which it is employed," and that "it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship, or of business convenience or the like."

At the same time the Government Solicitor pointed out that a strict application of the principle involved in the English case may be of far-reaching effect as regards the practice of the commercial community, and may be considered to necessitate a revolution of the existing practice involving much inconvenience in the working of the internal machinery of offices and businesses. While accepting, as above stated, the opinion of the Law Officers, the Board consider that the question, whether exemption-clause (b) to Article 53 of the Stamp Act was or was not applicable in the present cases, is of such importance as to render it expedient that a ruling of the Hon'ble High Court should be obtained."

The Advocate-General (Mr. Kenrick, K.C.), for the Board of Revenue, contended that the documents in question were undoubtedly acknowledgments given in respect of the receipt of money, and were, therefore, receipts for money within the meaning of the Stamp Act, and as such were liable to the stamp-duty imposed by that Act. They were not exempted from duty under Schedule I, Article 53 (b), which exempts from liability to duty any payment of money made without consideration.

Payment by the cashier of a firm, to a servant or agent, of money to be applied to specific purposes on behalf of the firm, could not be regarded legally as money paid without consideration. The mere fact of a gratuitous bailee undertaking to hand over money to a third person was sufficient to raise an implication of consideration. Consideration in English law means some profit or advantage to the one party, or some detriment, disadvantage or liability incurred by the other party: see the definition of consideration in *Misa v. Currie* (1). In the present case the cashier, acting on behalf of the firm in requiring a stamp receipt for money handed to an assistant to

be laid out for the purposes of the firm, would acquire the advantage of an evidentiary document which would be valuable for purposes of account. Moreover, the assistant in receiving the money impliedly undertook to expend it for the purposes of the firm, and incurred a liability to account for its due and proper expenditure which could be enforced by action. He was, in fact, in the position of a gratuitous bailee, and the law imports the doctrine of consideration into every bailment. In the legal sense, therefore, there was consideration, and the transaction could not properly be viewed as a payment without consideration so as to be exempt from stamp duty : *Attorney-General v. Carlton Bank* (1) referred to.

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Mr. B. Chakravarti, for Messrs. Burn & Co. The argument of the learned Advocate-General is based on a total misconception of the true nature of the transaction. Sums of money have been made over by the cashier of the firm to its various assistants for facility of business and for meeting its liabilities to various creditors. And until paid out to the creditors, the money continues to be the money of the firm and in its possession, although distributed amongst several servants of the firm for the efficient carrying out of its business. It is like putting money by a person in several safes in his house, and the so called receipts in this case may be well compared to keeping a note of the contents of each safe. Further, what are the relations between the firm on the one hand and its servants on the other in respect of the sums made over to them in the circumstances of this case ? The servants are in no sense the debtors of the firm in respect of these sums ; their liability, if any, in this respect, arises from the subsisting relationship of master and servant. As between the assistants and the cashier, the documents under consideration cannot properly be called acquittances. They are merely memoranda and not discharges. Further, how can it be said that there was any contract between them ? The absurdity of the whole thing was quite apparent from the difficulty my learned friend found in answering your

(1) [1899] 2 Q. B. 158.

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Lordship's questions as to what the consideration was, and from whom it moved and to whom. Why should the Revenue Authorities expect to be paid more than once in respect of one and the same transaction? Proper stamp is of course paid on sums paid out by the firm to outsiders and creditors. The case of *Attorney-General v. Carlton Bank* (1) is distinguishable. The English statute makes no provision for exemption for payments made without consideration. Then, the money in that case did not come into the possession of the Bank until Coxwell made it over to the Bank.

JENKINS C.J. This is a case which has been referred to this Court under section 57 of the Indian Stamp Act, and though the case submits, for our consideration, several documents termed pay orders, it has been agreed by the contending parties that we should express our opinion as to the liability to stamp-duty of one only of these documents, and that this opinion should be treated as governing the rest.

The document selected for this purpose is in these terms :—

"BURN & CO., LD., HOWRAH, Pay Order 8684
In favour of Mr. J. C. Hinde.
Account—Export Cash.

	PARTICULARS.	Rs.	A.	P.	SIGNATURE OF PAYEE.
Passed for under rupees seventy-one only.	To amount of freight for export charges on Orders Nos. 11085, 11138, 3783, 3577, 2632 ...	70	0	0	Pay. (Initials illegible). 20-6-1908.
	Received Rs. 70 (seventy only), C. JONES—20-6-1908. Rupees seventy only. J. C. HINDE.				
	Exmd.—J. N. M. Dated the 20th June 1908. Pay rupees seventy only. Annas—Nil. Pies—Nil.	70	0	0	
					Entd. C. B. Folio 20-6-1908.

" Orders Nos. 11083, 11138, 3783, 3577, 2632.

Pay order.

Accounts—

Mr. RIBBINS,

Please issue a pay order for Rs. 70 (seventy only) being freight on the above orders.

The 19th June 1908.

The 19th June 1908.

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According to the statement submitted for our opinion, what happened in the ordinary course of the Company's business was this.

"Previously to disbursement of the sums in question, pay orders were made out by the Accounts Department of the firm and were sent to the cashier, who paid the sums to the assistants. At the same time the assistants acknowledged receipt by signing their names or initials on the pay orders, in some cases also writing the word "Received" on the pay order."

It will be seen that in the pay order I have read, C. Jones wrote his name below the words "Received Rs. 70 (seventy only)." This, it is said, is a receipt which requires to be stamped under the Indian Stamp Act. The provisions of that Act which are directly applicable are section 2 (23) and Article 53 in the first Schedule. It is provided by section 2 (23) that a receipt includes (among other things) any note, memorandum, or writing whereby any money is acknowledged to have been received, while Article 53 exempts from duty a receipt for any payment of money without consideration. The argument for the Board is briefly this :—Money was received by the assistant from the cashier ; this was acknowledged by a writing ; and the payment of the money was not without consideration. Consideration, it was said, moved between the cashier and the assistant, and there was a contract between these two servants of the Company. But this argument appears to me to give the go-bye to the realities of the case, and to concentrate attention on one feature of the transaction without regard to the rest.

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Now, what was the transaction? The Company owed money to a creditor, and for the purpose of discharging this liability, the Company's money was handed by the Company's cashier, its custodian, to the Company's assistant in order that he might hand it over to the creditor. Until the money was handed over to the creditor, it throughout continued to be the Company's money and to be in the Company's possession, though its custody was at one time with one of its servants and at another time with another: *Rex v. Paradise* (1) and *Rex v. Murray* (2). It loses sight of the true relations between those concerned to say that there was a contract between the cashier and the assistant, or that consideration moved between them: for the purpose of the matter in hand, they were parts of the machinery whereby the business of a large concern has to be carried on; and the signature by C. Jones was but a useful expedient for the purposes of the internal economy of the Company's business, affording a means of identifying the assistant through whose hands the Company's money passed for payment to the Company's creditor.

The Advocate-General has relied strongly on *Attorney-General v. Carlton Bank* (3), and has, indeed, suggested that it covers this case. But that decision is clearly distinguishable. It was a decision on the English Stamp Act, 1891, in which there is no provision, as there is in the Indian Act, for exemption when payment is made without consideration. And it is further to be noticed that there the money, for payment of which the acknowledgments were given, was received by C. S. Coxwell from customers of the Bank and handed over by him to the Bank, so that the money did not come into the Bank's possession until handed over by Coxwell. In the opinion of the Lord Chief Justice, when Coxwell handed over the moneys to the Bank, he, in fact, was paying a debt (see at p. 164), and the receipt was given by the Bank. Here, however, it would be impossible to hold that there was the relation of debtor and creditor, either between the assistant and the

(1) (1766) 2 East P. C. 565.

(2) (1830) 1 Moody C. C. 276.

(3) [1899] 2 Q. B. 158.

cashier, as was argued by the Advocate-General, or as between the assistant and his employer, the Company.

At the same time it is significant that the Lord Chief Justice gave a manifest indication of opinion, as to which the Solicitor-General on behalf of the Crown assented, that the multiform invoices in large shops for the purpose of identifying the particular clerk through whose hands money passed did not require to be stamped.

It has been urged that the case is one of great importance to the Board of Revenue, but its importance probably lies not so much in the direction of the possibility of increasing the receipt of revenue as of embarrassing the conduct of business, for were we constrained to decide in the Board's favour, it is not unreasonable to suppose that these signatures would not be taken. But these are considerations with which we have no concern. Our duty is to construe the Act and apply it to the transaction under consideration, and so doing, we hold that the document submitted for our consideration does not require a receipt stamp by reason of C. Jones' signature thereon.

By the agreement of counsel this decision will govern the case as to the other documents.

DOSS AND CHATTERJEE JJ. concurred.

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FULL BENCH.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Brett,
Mr. Justice Woodroffe, Mr. Justice Mookerjee, Mr. Justice Holmwood,
Mr. Justice Sharfuddin and Mr. Justice Doss.*

1910

June 14.

BAHADUR

v.

ERADATULLAH MALLICK.*

"Court," meaning of—Offence brought under the notice of the Court in the course of a judicial proceeding—Proceeding instituted by one Munsif for resistance to attachment of moveables in execution—Preliminary inquiry and final order by successor—Legality of order—"Judicial proceeding"—Execution proceedings—Criminal Procedure Code (Act V of 1898) ss. 4 (m), 476.

The word "Court" in s. 476 of the Criminal Procedure Code includes the successor of the Judge before whom the alleged offence was committed, or to whose notice the commission of it was brought in the course of a judicial proceeding.

Where, therefore, the judgment-creditor brought to the notice of the Munsif, on the 23rd December 1908, the fact of resistance to the attachment of moveables in execution of his decree, and the Munsif called upon the opposite party to show cause, but his successor, after holding a preliminary enquiry under s. 476 of the Code, ordered their prosecution, on 6th October 1909, for offences under ss. 183, 186 and 353 of the Penal Code:—

Held, that the order was not without jurisdiction.

Action under s. 476 should, as far as possible, be prompt and expeditious and not unduly protracted.

The definition of a "judicial proceeding" in s. 4 (m) of the Criminal Procedure Code is not exhaustive. It includes an execution proceeding; and the resistance to the attachment of moveables is, when reported or complained of to the Court, an offence brought under its notice in the course of a judicial proceeding within the meaning of s. 476 of the Code.

Sheikh Eradatulla Mallick and his father, the taluqdars of village Jhansi, in the Hooghly District, obtained two *ex parte* rent decrees in suits Nos. 413 and 414 of 1908, respectively, against the petitioner, Pran Krishna Mandal, and his brothers. Applications for execution of the decrees were made, on the

*Reference to Full Bench in Civil Rule No. 778 of 1910.

17th September, to Babu B. B. Mukerjee, Third Munsif of Howrah, who ordered warrants of attachment of the moveables of the judgment-debtors to issue on the 10th December. On the 23rd two peons, Jagdish Chunder Ghosh and Sital Chunder Roy, went with the two warrants to Hakola, accompanied by Kiran Sardar, the identifier, and Ashutosh Sardar, a drummer. After Jagdish had attached certain articles in the house of Pran Krishna, the latter came and asked for half an hour's time to pay. He then went away, but returned shortly after with 10 or 12 persons. The petitioners, Bahadur and Manik, tore up the warrants, while some of the others re-captured the attached property and assaulted the peons, the identifier and the drummer. On the same day the peons submitted separate reports of the occurrence, and two applications were made by the decree-holders to the Munsif praying that the petitioners might be committed for trial under sections 183, 186 and 353 of the Penal Code, and the Munsif issued notices upon them, under section 476 of the Criminal Procedure Code, to show cause why they should not be prosecuted as prayed for. He fixed the 23rd January 1909 for the hearing of the case, but it was subsequently postponed from time to time at the instance of the one or the other party. Babu B. B. Mukerjee was transferred on some date after the 1st May. His successor, Babu P. K. Mukerjee, after several other postponements, ultimately took the matter up on the 25th September and examined the peons, the identifier and the drummer. By his order, dated the 6th October, he directed the prosecution of the five petitioners under sections 183, 186 and 353 of the Penal Code, and sent a copy of his order to the District Magistrate of Howrah.

On the 21st January 1910, the petitioners moved the Sessions Judge of Hooghly, who at first determined to send up a report to the High Court recommending the quashing of the order, but he dismissed the application on the 31st, on the ground that he had no power to refer the case. The petitioners then, on the 21st February, obtained a Rule from the High Court (Mookerjee and Teunon JJ.) which came on for hearing before the same Bench. Their Lordships, after hearing the

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learned pleaders for the parties, determined to send the case for the decision of a Full Bench, in the following terms :—

“ We are invited in this Rule to set aside an order made under s. 476 of the Criminal Procedure Code, on the ground that the offence in respect of which it has been made was not brought to the notice of the Judicial Officer who made it. The circumstances under which the order was made are not disputed. On the 17th September 1908, Eradatullah Mallick and others, one of whom is the opposite party to this Rule, applied in the Court of the Third Munsif of Howrah for the execution of a decree which they held against Pran Krishna Mandal and others, some of whom are petitioners before this Court. Writ of attachment under s. 254 of the Civil Procedure Code was directed to be issued on the 10th December 1908. At the time when this writ was executed obstruction was caused by certain persons : the peon, the drummer and the identifier were assaulted, copies of the writ were torn into pieces, and the moveable properties attached were snatched away. On the 23rd December 1908 the peon made a report to this effect, and the decree-holders also applied for the prosecution of the persons who were alleged to have committed these offences. The Munsif, Mr. B. B. Mukerjee, directed notices to be issued on the persons named in the petition to show cause why they should not be criminally prosecuted. The notices were served in due course. The parties called upon to show cause appeared, and upon their application time was granted to them to put in their defence. The decree-holder took out summonses upon his witnesses, and, as some of the witnesses so summoned did not enter appearance, fresh processes had to be issued and the case adjourned, from time to time, at the instance of one or other of the parties. Meanwhile Mr. B. B. Mukerjee was transferred, and Mr. P. K. Mukerjee succeeded him on some day between the 1st May and 5th June 1909. The persons called upon to show cause repeatedly obtained adjournments to enable them to produce evidence, oral or documentary, with the result that the case was not heard till the 4th October 1909 ; the case was closed on the day following, and the order under s. 476 was made on the 6th October 1909. The validity of that order is now attacked substantially on the ground that Mr. P. K. Mukerjee had no jurisdiction to make it, inasmuch as the offence alleged to have been committed was not brought to his notice, but to the notice of his predecessor. In support of this proposition, reliance is placed upon the decision of the majority of a Full Bench of this Court in *Begu Singh v. Emperor* (1), which was followed in *Kartik Ram Bhakat v. Emperor* (2). It is also suggested, somewhat faintly, that s. 476 is inapplicable, inasmuch as an execution proceeding is not a judicial proceeding, and, therefore, the commission of the offence cannot be said in this case to have been brought to the notice of the Court “ in the course of a judicial proceeding.” In support of this proposition reliance is placed upon the cases of *Hara Charan Mookerjee v. King-Emperor* (3) and *Kanto Ram Das v. Gobardhan Das* (4).

(1) (1907) I. L. R. 34 Calc. 551.

(2) (1907) I. L. R. 35 Calc. 114.

(3) (1905) I. L. R. 32 Calc. 367.

(4) (1907) I. L. R. 35 Calc. 133.

In so far as the first of the grounds urged on behalf of the petitioner is concerned, it must be conceded that the Full Bench decision to which reference is made does support it. The majority of the Court decided in that case that the expression "Court" in s. 476 means the Judge who tries the case in the Court before which the offence is committed. If this view is adopted, there is no room for controversy that the order now under consideration was made without jurisdiction. The learned vakil who has appeared to show cause has, however, invited us to re-consider the matter in view of the fact that the rule laid down in the Full Bench case has been dissented from by the learned Judges of the Bombay and Allahabad High Courts [*In re Lakshmidas Lalji* (1) and *Girwar Prasad v. King-Emperor* (2)], while the case of *Rahimadulla Sahib v. Emperor* (3), though it may at first sight appear to support the contention of the petitioners, is found on closer examination to decide merely that the power conferred by s. 476 is properly exercisable only at or immediately after the conclusion of the trial. We have carefully examined the decisions to which reference has been made, with the result that we feel constrained to express the doubts we entertain as to the soundness of the view that in s. 476 the expression "Court" signifies the Judge who tries the case. The line of reasoning which commended itself to the majority of the Full Bench was that, unless this view of the scope of s. 476 was adopted, there would be no reason for the existence of s. 195. The case which was then before the Court was one of the commission of an offence in the course of a judicial proceeding, and it was held that, if the power conferred by s. 476 is to be exercised in a case of this description, it ought to be exercised at or immediately after the conclusion of the trial. The inference was, therefore, drawn that the power conferred by s. 476 could be exercised only by the Judge who tried the case in the course of the trial of which the alleged offence was committed. Sufficient attention does not appear to have been paid to the other contingency contemplated by the section, namely, the commission of an offence, not before the Court, but brought to its notice in the course of a judicial proceeding. In such a contingency it is obviously impracticable to make an order under s. 476 on the basis of the materials before the Court, which has seisin of the judicial proceeding. This is well illustrated by the facts of the case now before us. Here it was alleged that offences of a serious nature had been committed while officers of the Court were making an attempt to execute the writ and to attach the moveables of the judgment-debtors. Obviously, an investigation into the truth or otherwise of this allegation by means of evidence adduced before the Court would be essential, and the matter to be investigated would be distinct from the determination of any question which might arise in relation to the execution of the decree between the decree-holders and the judgment-debtors. Here the investigation was taken up immediately after the matter was reported to the Court; but during the pendency of the enquiry the presiding officer was transferred. The whole of the evidence was adduced before his successor, who held that a *prima facie* case had been made out so as to justify an order under s. 476. Indeed, the learned vakil for the opposite

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(1) (1907) I. L. R. 32 Bom. 184, (2) (1909) 6 A. L. J. 392.

(3) (1908) I. L. R. 31 Mad. 140.

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party has suggested that in a case of this description the expression "Court" cannot mean the officer who had seisin of the execution proceedings, and he has sought on this ground to distinguish the Full Bench decision in *Begu Singh v. Emperor* (1). It is manifest, however, that the expression "Court" cannot be interpreted in two different ways in the same section in two different cases. We cannot hold that, in the case of the commission of offences before a Court in the course of a judicial proceeding, the expression "Court" means the officer in whose presence the offence is committed, whereas in the case of offences alleged to have been committed, not in Court, but elsewhere, and brought to the notice of the Court, the same expression does not mean the presiding officer. The position is intelligible that in the former class of cases the successor of the Judge before whom the alleged offence has been committed should be very reluctant to make an order under s. 476 when no such order has been made by his predecessor, who, with all the materials before him, did not think it proper to make any such order; but it can hardly be affirmed that under no circumstances should the successor in office of a Judge make an order under s. 476; for, as Mr. Justice Chandavarkar points out in the case of *In re Lakshmidas Lalji* (2), the fact that an offence had been committed may be discovered after the original Judge has ceased to be a member of the Court. In the second class of cases, however, it is fairly clear that, in order to determine whether the alleged offence brought to the notice of the Court has been committed, an independent investigation would be necessary, and it is not easy to realize on what principle the position can be defended that such enquiry must be by the Judge who had seisin of the proceedings, and not by his successor. It is not necessary for us to examine minutely the reasons given in the judgment of the majority of the Full Bench in *Begu Singh v. Emperor* (1). We may state generally that we agree with the comments made thereon by the learned Judges of the Madras and Allahabad High Courts in the two cases already mentioned. As the question is one of fundamental importance, and as we are unable to appreciate the decision of the majority of the Full Bench, we must refer for the consideration of a Special Bench the following question: Whether the expression "Court," in s. 476 of the Criminal Procedure Code, means the Judge before whom the alleged offence has been committed, or to whose notice the commission of the alleged offence has been brought in the course of a judicial proceeding.

The second ground, which has been faintly suggested in support of the Rule, is that an execution proceeding is not a judicial proceeding within the meaning of s. 476. Upon this point there is a divergence of opinion. The cases of *Hara Charan Mookerjee v. King-Emperor* (3) and *Kanto Ram Das v. Gobardhan Das* (4) appear to support the petitioners' view. The cases of *Bhola Nath Dey v. Emperor* (5), and *Dakhineswar Misra v. Haris Chundra Chatterji* (6) support the opposite conclusion. Our own inclination is to adopt the rule laid down in the cases of *Bhola Nath Dey v. King-Emperor* (5) and

(1) (1907) I. L. R. 34 Calc. 551.

(2) (1907) I. L. R. 32 Bom. 184, 191.

(3) (1903) I. L. R. 32 Calc. 367.

(4) (1907) I. L. R. 35 Calc. 133.

(5) (1905) 10 C. W. N. 55.

(6) (1909) 10 C. L. J. 450.

Dakhineswar Misra v. Haris Chundra Chatterji (1). As under the rules of the Court the whole case has to be considered by the Special Bench, this question also will be open for consideration.

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Babu Manmatha Nath Mookerjee, for the petitioners. The case falls within the decision in *Begu Singh v. Emperor* (2) which is good law. I rely on the wording of section 476, which shows that "Court" means the Judge before whom the offence is committed or to whose notice it is brought in the course of a judicial proceeding. The scope of sections 195 and 476 is different. When the Court proceeds under the latter section, it takes the responsibility of the prosecution on itself. I adopt the reasoning in the case cited above. If the successor can pass an order under the section, an injustice might arise from his not knowing the facts of the case. The reference to the Full Bench here proceeds on the Bombay and Allahabad cases mentioned therein. The latter loses sight of the words "brought to its notice." Section 476 contemplates a summary inquiry by the same Judge exercising his discretion. The successor does not exercise the discretion contemplated by the section, but continues the proceedings. As to the second question, an execution proceeding is a ministerial and not a judicial proceeding: *Hara Charan Mookerjee v. King-Emperor* (3).

Babu Harendra Nath Mitra, for the opposite party, was called upon to argue only the first question referred to the Full Bench. [After comparing the arrangement of the sections corresponding to sections 195 and 476 in the earlier Codes, he continued:] Section 476 defines the procedure applicable to complaints of public servants and of Courts under section 195. This is the answer to *Begu Singh v. Emperor* (2). There is nothing in section 476 which restricts the meaning of the word "Court." As to hardship or inconvenience, the section provides a preliminary inquiry as a safeguard against it. Besides, this is no ground for limiting the meaning of the word. The object of section 476 is explained in *Ishri Prasad v. Sham Lal* (4),

(1) (1909) 10 C. L. J. 450.

(2) (1907) I. L. R. 34 Cal. 551.

(3) (1903) I. L. R. 32 Cal. 367.

(4) (1885) I. L. R. 7 All. 871.

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and by the addition of the opening words to section 200 : *In re Lakshmidas Lalji* (1), *Girwar Prasad v. King-Emperor* (2) at p. 398, and *Emperor v. Molla Fuzla Karim* (3). The case of *Rahimadulla Sahib v. Emperor* (4) merely decides that action under the section should be prompt.

The judgment of the Court (JENKINS C.J., BRETT, WOODROFFE, MOOKERJEE, HOLMWOOD, SHARFUDDIN AND DOSS JJ.) was as follows :—

Two questions have been referred to us for decision in this Rule, namely :—

(i) Whether the expression “Court” in section 476 of the Criminal Procedure Code means merely the Judge before whom the alleged offence has been committed, or to whose notice the commission of the alleged offence has been brought in the course of a judicial proceeding ?

(ii) Whether an execution proceeding is a “judicial proceeding” within the meaning of section 476 of the Criminal Procedure Code ?

Upon a careful consideration of the cases mentioned in the order of Reference, as also those cited at the bar, and upon an examination of the language of section 476 of the Criminal Procedure Code, we are of opinion that there is nothing in that section to warrant our withholding from the word “Court” its natural meaning with the sense of continuity this implies, notwithstanding any change of officers.

We are of opinion that the first question ought to be answered in the negative.

The second question ought, in our opinion, to be answered in the affirmative. We entertain no doubt that an execution proceeding is a “judicial proceeding ;” the definition in section 4, clause (m) of the Code of 1898 is clearly not exhaustive. In this case the alleged offence was brought under the notice of the Court in the course of such judicial proceeding, and hence section 476 clearly came into play.

(1) (1907) I. L. R. 32, Bom. 184.

(2) (1909) 6 A. L. J. 392.

(3) (1905) I. L. R. 33 Calc. 193.

(4) (1908) I. L. R. 31 Mad. 140.

It follows, therefore, that Mr. P. K. Mukerjee had jurisdiction to make the order of the 6th October 1909. At the same time we must express our disapproval of the undue protraction of the proceedings. Action under this section should, as far as possible, be prompt and expeditious. The alleged offence was brought to the notice of the Court on the 23rd December 1908, and it was not until 6th October 1909 that the Court passed its final order.

The Rule is accordingly discharged. There will be no order as to costs.

E. H. M.

Rule discharged.

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ORIGINAL CIVIL.

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The Courts in India have an inherent power to amend or vary decrees so as to bring them into accordance with the judgments, after they are signed by the Judges, even if they do not fall within section 152 of the Civil Procedure Code (Act V of 1908.)

In re Swire (1) referred to.

Ainsworth v. Wilding (2) distinguished.

The Sheriff is only entitled to poundage on sums levied: so where a seizure is wrongful and is withdrawn by direction of law, the Sheriff receives no poundage.

Mortimore v. Cragg (3), *In re Ludmore* (4) and *In re Thomas* (5) followed.

RULES were obtained by the defendants, Jaynarain and others, calling upon the plaintiffs to show cause (a) why the

* Applications in Original Civil Suit No. 85 of 1909.

(1) (1885) 30 Ch. D. 239.

(3) (1878) 3 C. P. D. 216.

(2) [1896] 1 Ch. 673.

(4) (1884) 13 Q. B. D. 415.

(5) [1899] 1 Q. B. 460.

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decree in the suit should not be amended by inserting a clause as to the payment by the plaintiffs to the defendants of interest accumulated on certain Government promissory notes up to the 22nd September 1909; and (b) why the execution issued in this suit against the effects of the defendants should not be set aside and the attached property released.

The facts of the case are shortly as follows. The plaintiffs and the defendants were members of a Marwari family, and the matters at issue between them were in respect of the various businesses carried on by the members of the family in partnership. Musammatt Gota, the mother and next friend of the infant plaintiffs, filed the present suit on their behalf in the early part of 1909 against one Buldeo Dass. Buldeo Dass died in July 1909, and the present defendants were substituted on the record. In August 1909, one Rai Bahadur Kustoor Chand Daga was appointed guardian of the property of the minor plaintiffs. A petition for compromising the suit was drafted by the plaintiffs' attorney, and after being altered in parts by the defendants' attorney, was eventually agreed upon, and the matter came before Mr. Justice Chitty on the 29th November 1909 for settlement, and his Lordship passed the following order: "Decree in terms of petition. Certified that the terms are for the benefit of the infants. All securities and promissory notes will be paid to the guardian appointed by the Court to be endorsed in the name of the guardian." There was some delay in drawing up the decree. The decree contained no stipulation as to payment by the plaintiffs to the defendants of interest accumulated upon Government promissory notes up to the 22nd September 1909, but directed, among other things, that Jaynarain should endorse and deliver over to Kustoor Chand Daga, the guardian of the property of the plaintiffs, certain Government promissory notes, and that upon the endorsements and payments being made, satisfaction in respect of the decree should be entered up.

The decree was filed on the 7th January 1910, and on the 10th January the plaintiffs applied to the Court for execution of the decree by attachment of the safes and cash-boxes belonging

to the defendants. The Court not being put in possession of the full facts at that time ordered execution to issue. On the 11th January the writ was handed to the Sheriff and was executed that same day by the seizure of the contents of a safe at the defendants' *guddi*. Thereafter, on the 13th January, the defendants applied for and obtained the present two rules.

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Mr. Knight (with him *Mr. N. N. Sircar*), for the defendant Jaynarain. The Sheriff's name is not included in this rule, so he has no right to appear here. The rule is quite clear: Lush's Practice, 3rd edition, 942; Chitty's Archibald's Practice, 13th edition, 1261. The principle is, no sale no poundage: *Miles v. Harris* (1). If the Sheriff has any claim for poundage let him file a suit.

Mr. Stokes, for the Sheriff. I am entitled to my poundage out of the property attached and which is in my possession: *Harding v. Hall* (2). No order is ever made against any person unless he is given an opportunity of being heard: *Johnson v. Marriat* (3).

Mr. B. Chakravarti (with him *Mr. S. R. Das*), for the plaintiff, showing cause. The Court can set aside an attachment if there is any irregularity in the order, or some misconduct of the person taking out execution which is in the nature of fraud come to between the parties. The mere presence or absence of the defendant is no ground for preventing execution of a decree. A consent decree, signed and filed, cannot be amended by motion; it must be by suit. The order was made under order XXI, rule 17. Order XXI, rule 12, has no application here: see order XXI, rules 30, 31.

With regard to the payment of Rs. 96,000, why should I not ask for attachment? I can attach any property of the defendant, or attach him and send him to jail, if necessary. As long as the decree stands and is carried into execution, the Court executing the decree cannot go behind that decree and then grant the applicant relief on the ground that it ought to have

(1) (1862) 12 C. B. (N. S.) 550.

(2) (1866) 14 L. T. R. 410.

(3) (1834) 2 Dowl. 343, 345.

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been in another form. The decree cannot be varied by motion. The case of *Ainsworth v. Wilding* (1) discusses the same words now to be found in order XXVIII, rule 11. All the cases are cited in Daniell's Chancery Practice, page 349. After the decree is filed, the only jurisdiction the Court has is under order XXVIII, rule 11. In Belchambers' Rules and Orders, page 186, provisions are made with regard to speaking to the minutes of the decree and no further. The Court cannot vary the decree now at the instance of one of the defendants: order XXI, rule 31.

Mr. Knight (contra). Persons seeking *ex parte* orders must be thoroughly open with the Court. Here the order has been obtained by a disreputable trick, the attorney on the other side suppressing certain facts. A fraud having been practised on the Court, the Court has an inherent right to recall the order: *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (2). I do not seek a variation, but ask that the decree shall agree with the judgment: Woodroffe and Ameer Ali's Civil Procedure Code, 1908, page 833; *In re Swire* (3), *Shipwright v. Clements* (4), *E. v. E.* (5) and *Bibi Tasliman v. Harihar Mahto* (6).

Order XXI, rules 30 and 31 do not apply. This is not a decree for payment of money. A general power-of-attorney by the defendant will not cover the case; it must be special. Order XXI, rule 34, is the only rule that applies to this case, and it is significant that the other side have never referred to it at all. As to attorneys insisting upon the strict letter of their rights, see the *dictum* of Rigby L. J. quoted by Lopes L. J. in *Graham v. Sutton, Carden & Co.* (7).

CHITTY J. These are two rules obtained by the defendants in suit No. 85 of 1909, calling on the plaintiffs to show cause (i)

(1) [1896] 1 Ch. 673.

(4) (1890) 38 W. R. 746.

(2) (1899) 1 L. R. 23 Mad. 227:

(5) [1903] P. 88.

L. R. 27 I. A. 17, 27.

(6) (1904) 1 L. R. 32 Calc. 253;

(3) (1885) 30 Ch. D. 239.

9 C. W. N. 81.

(7) [1897] 2 Ch. 367, 370.

why the decree in the suit should not be amended by inserting a clause as to the payment by the plaintiffs to the defendants of interest accumulated on certain Government promissory notes up to the 22nd September 1909, and (ii) why the execution issued in this suit against the effects of the defendants should not be set aside and the attached property released. The facts are shortly as follows :—The plaintiffs and the defendants are members of a Marwari family, and the matters at issue between them were in respect of the various businesses carried on by members of the family in partnership. In the early part of 1909 the present suit was filed in the names of the plaintiffs, who are minors, by Musammat Gota, their mother and next friend. Buldeo Dass, father of the present defendant Jaynarain, and grandfather of the two minor defendants, was the original defendant. I am told that the terms of settlement which were eventually come to were in the main proposed and arranged by him. In July 1909 Buldeo Dass died, and the present defendants on the record were substituted. Later on, the defendant Jaynarain was appointed guardian *ad litem* of the minor defendants. In August 1909 the appointment of Rai Bahadur Kustoor Chand Daga as guardian of the property of the minor plaintiffs was completed. After the long vacation, terms of settlement were finally arrived at between the parties. A petition for compromise was drafted by the plaintiffs' attorneys and sent to the defendants' attorneys for approval. It was extensively altered by Mr. McNair in red ink. In paragraph 16 he added to the statement that "the accounts of the said partnership businesses were made up and adjusted" the following words "up to the 22nd September 1909, and upon the footing that all interest up to and including the said date on the said Government paper of the par value of Rs. 8,00,000 mentioned in the 13th paragraph hereof, and also on the Government paper of the par value of Rs. 1,75,000 mentioned in the 23rd paragraph hereof as purchased on the 25th September 1909, should be paid to your petitioner" (*i.e.*, Musammat Gota). At the same time, as it was the intention of the parties that the settlement should date as from 22nd

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September 1909, it was necessary that the plaintiffs should make good to the defendants the interest on the Government paper up to that date which they would draw on the notes, and Mr. McNair accordingly added in the prayer of the petition to the words "that a decree be made in terms thereof" the words "and in particular for the endorsement and delivery by the defendant Jaynarain to your petitioners of the said Government promissory notes (giving the numbers and amounts) upon your petitioners paying to the defendants the equivalent of all accumulated interest on the said Government paper up to and inclusive of the 22nd September 1909," etc. The alterations by Mr. McNair were accepted *in toto* by the plaintiffs' attorney. The petition so altered was engrossed in his office and signed by Mothura Dass Pachesia for Musammat Gota and by Jaynarain as well as by the respective attorneys. To Mothura Dass Pachesia and Jaynarain it was explained by the Court Interpreter. The petition must therefore be taken to represent the terms to which the parties consented at that time, and I cannot accept the present statement of Mr. A. C. Bose that he noticed that nothing had been added by Mr. McNair in paragraph 23 regarding the interest prior to 22nd September 1909, but did not notice what Mr. McNair had added about the interest in the prayer of the petition, or that, if he had noticed it, he would not have consented to its being made a condition precedent to the delivery of the securities. The matter came before me in Court on 29th November 1909, and after determining that the settlement was for the benefit of the several minors concerned, I passed judgment in terms of the petition. The Court minute is—"Decree in terms of petition. Certified that the terms are for benefit of infants. All securities and promissory notes will be paid to the guardian appointed by the Court to be endorsed in the name of the guardian." There appears to have been some little delay in drawing up the decree. I am told by the Registrar that it was at first drafted by the defendants' counsel and subsequently re-drafted in the office. However this may be, it was certainly submitted to counsel on both sides for settlement, the point before counsel

being not so much the form of the decree, as the legality of the order on Jaynarain to endorse and deliver over the Government promissory notes and his capacity to do so effectively. The decree as drawn contained no stipulation as to the payment by the plaintiffs to the defendants of the interest accumulated upon the Government promissory notes up to 22nd September 1909. The decree was signed by me on 7th January 1910. It directed (*inter alia*) that Jaynarain should endorse and deliver over to Dewan Kustoor Chand Bahadur, C.I.E., the guardian of the property of the plaintiffs, Government promissory notes of the aggregate par value of Rs. 7,25,000, and on behalf of himself and the other members of the partnership other Government promissory notes of the aggregate par value of Rs. 2,50,000, and should also pay to the same person the sum of Rs. 96,700-12-9, and that upon the endorsements and payments aforesaid being made, satisfaction in respect of the decree should be entered up. It may be stated that prior to the signing and filing of the decree the plaintiffs' attorney had been calling upon the defendants' attorneys to have this portion of the decree carried out. Mr. McNair had, however, declined to act on his own responsibility in this respect, or to advise his client to do anything until the decree was filed; at the same time there was no actual refusal on the part of the defendants to carry out the decree. On the contrary, the fact that the notes, when seized, were found tied up together and endorsed in blank, shows that they were ready for delivery when the time arrived. The decree having been filed on 7th January 1910, the plaintiffs' attorneys on that day sent to Messrs. Morgan & Co. a letter and one copy of the decree, and to Babu R. M. Chatterjee the attorney on record for the infant defendants and an assistant in Messrs. Morgan and Co.'s office, a second copy of the decree. By what appears to have been gross carelessness on the part of the clerks in Messrs. Morgan & Co.'s office, both copies of the decree and the letter were laid on the table of Babu R. M. Chatterjee who was absent from Calcutta. Mr. McNair was thus not formally apprised of the intention of the plaintiffs to apply for the execution of

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the decree at once. He seems to have heard some rumour of it on the 8th, but naturally did not pay much attention to it. The letter, though addressed to Messrs. Morgan & Co., was not found by him until the 11th, when he had seen Mr. A. C. Bose, and, having heard of it from him, made a search for it. Meanwhile, on the 8th January, the plaintiffs applied to the Registrar for execution of their decree by attachment of the safes and cash-boxes containing moneys belonging to the defendants at the *guddi* of the defendants. The Registrar expressed a doubt whether execution in this way could issue at the instance of the plaintiffs' next friend, as the decree ordered endorsement and delivery and payment of the moneys to plaintiffs' guardian Kustoor Chand Daga. He directed the application to be made to the Court. On Monday, the 10th January, counsel for the plaintiffs applied to me to issue execution. He did not fully state the facts of the case, and I understood from him that the sole point was whether, in the case of a decree for money in favour of infant plaintiffs, which ordered the money to be paid to the plaintiffs' guardian, the next friend was competent to apply for the execution. I expressed an opinion, which I still hold, that he was. Only the decree-holder can apply for execution, and the question of payment out to the correct person could easily be arranged when the money, or any part of it, was realised. I do not absolve myself from blame for not looking more carefully into the matter, but at the same time I must say that, in a case of this nature, it was counsel's duty to have placed the full facts before the Court and not to have taken the order without doing so. I should never have allowed the execution by attachment to go had I been put in possession of the full facts, and the order must in this respect be taken to have been made *per incuriam*. On the 11th January the writ was handed to the Sheriff and was executed that afternoon by the seizure of the contents of a safe at the defendants' *guddi*. These contents consisted of the identical Government promissory notes the subject matter of this decree, certain hundies and receipts for money, and a sum of Rs. 260 in currency notes. On the 13th January 1910, on the application of the defendants'

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counsel, I granted both the present rules, and both questions, *i.e.*, as to the amendment of the decree and as to the attachment have been fully argued before me. The affidavits are very voluminous, but I do not think that I need go more fully into the facts. There is no question as to the facts as above stated. I will first deal with the question of the amendment of the decree, as the question whether the decree is correct in form must have an important bearing on the regularity of the execution. It was argued by the plaintiffs' counsel that the procedure now adopted was incorrect, that the decree could not be amended on motion, but that the plaintiffs must file a separate suit for that purpose. To that contention I cannot possibly accede. What is sought is to bring the decree into accordance with the judgment of the Court and with what it intended. Now it was clearly intended that the decree should be in terms of the petition. It was suggested that the prayer was no part of the petition, but that appears to me absurd. The prayer is the actual petition for relief, though it may refer back to the body of the document to avoid unnecessary repetition. It is only in respect of the provisions as to interest on the Government paper prior to the 22nd September 1909 that the decree does not accurately embody what the parties asked for in their petition. The case of *Ainsworth v. Wilding* (1), cited by the plaintiffs' counsel, was a totally different case, the motion there being to discharge a decree. It has been held in England that the Court has an inherent power to amend or vary a perfected order when it finds that the judgment as drawn up does not correctly state what the Court actually decided and intended, even if the matter does not fall within order XXVIII, rule II, which corresponds to section 152 of the Civil Procedure Code, and such a result is obtained on motion: *In re Swire, Mellor v. Swire* (2). In my opinion the Courts in India have the same inherent power, and I cannot see why a separate suit should be necessary here any more than in England. It is common ground that the plaintiffs were to be responsible to the defendants for the interest up to 22nd September 1909, and I see no

(1) [1896] 1 Ch. 673.

(2) (1885) 30 Ch. D. 239.

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reason whatever to suppose that the stipulation regarding it was not an integral part of the settlement to which by the petition they asked the Court to give effect. The plaintiffs' attorney, Mr. A. C. Bose, cannot now be heard to say that that was not a term of the settlement, when I find it embodied in the petition, which was accepted by him, and by Mothura Dass Pachesia, the *munim gomasta* of his client. I am, therefore, of opinion that the decree must be amended so as to bring it into accordance with the judgment of the Court. There is a slip in the petition for amendment, and consequently in the rule, the request being to add the stipulation as to interest after not only the direction to endorse and deliver the Government promissory notes, but also after the order for the payment of the Rs. 96,700-12-9. It should of course come, as in the prayer of the petition of compromise, immediately after the direction to endorse and deliver the two lots of Government promissory notes, but with reference to both. With this correction the first rule will be made absolute.

I now turn to the question of the execution and attachment. I have already said that my order for execution in the form in which it was issued was made *per incuriam*, and on that ground alone it would be equitable that it should be set aside. There are, however, other reasons. The plaintiffs' counsel argued that it could only be set aside on the ground of fraud or some irregularity. To this the defendants' counsel replied by charging the plaintiffs and their attorney with having perpetrated a fraud upon the Court and snatched the order by a trick. I do not think that what was done amounted to fraud. In the first place the plaintiffs' attorney had given notice to the defendants' attorneys that he would apply for execution at once. It was through the fault of his own clerks that Mr. McNair did not receive that intimation at once. It can hardly, however, be called fraudulent if the plaintiffs' attorney receiving no reply from the other side proceeded with his avowed intention. I have already stated that I ought to have been more fully informed by counsel as to the nature of the case, and in this respect both counsel and the attorney instructing him

were to blame, but I do not think that I need say more than this. I was also in fault in not looking more carefully into the matter, and I do not forget that though these matters were settled between the parties and the suit decreed on 29th November 1909, the defendant Jaynarain had shown no great eagerness to carry the matter through, and the plaintiffs' people were not unreasonably indignant at the idea that there would be further delay, which would keep the plaintiffs out of their money and also prevent them from carrying on the business as arranged by the decree.

On the ground of irregularity, however, I am clearly of opinion that the execution was bad. In the first place the decree sought to be executed was not the true decree between the parties. A very important provision had been omitted, which, if it had appeared in the decree, would have been fatal to the issue of the execution in the present manner and form. The precise amount of the accumulated interest has not been stated, but it must have been very considerable. Even a quarter's interest would amount to nearly Rs. 10,000. Whether the payment of this sum by the plaintiffs be regarded as a condition precedent to the endorsement and delivery of the Government promissory notes, or an act to be performed simultaneously with the endorsement and delivery and payment by Jaynarain, it is obvious that execution against the effects of the defendants could not have issued until the plaintiffs had paid or given some assurance for the payment of what was due by them to the defendants.

Then there is the important circumstance that Kustoor Chand Daga was not in Calcutta and had not been here since the decree was passed. Jaynarain also was absent, but this does not seem to me of so much importance. He could not be allowed by staying away to avoid performance of the Court's order. But Kustoor Chand Daga's absence is a different matter. The order was for endorsement and delivery to him and also for payment to him. So far as the endorsement and delivery are concerned this must mean an endorsement into his name and a personal delivery. In this respect the case is

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one of a decree for specific moveable property and falls under order XXI, rule 31. It does not, as was suggested by counsel for the defendants, fall under rule 34, which contemplates a decree for endorsement only, and further contemplates the negotiable instrument being in the possession of the decree-holder, or at any rate of the Court. I do not mean to say that if Jaynarain had refused to endorse and deliver over these Government promissory notes as ordered by the Court, the Court's order might not have been enforced by seizure of the notes, and if necessary by an endorsement by the Court itself. But in this case matters had never reached that stage. I do not think that it was open to the plaintiffs to seek to enforce by the attachment of the defendants' effects, a decree of the Court which, in the circumstances, it was physically impossible for the defendant Jaynarain to carry out. It was argued that the defendants' people might have handed over the Government promissory notes and made the payment of Rs. 96,700-12-9 to Madan Gopal Daga who, it was said, held a general power-of-attorney from Kustoor Chand Daga. To this the answer is that it is not proved that Madan Gopal Daga does in fact hold any such power. Still less does it appear that it would authorise him to receive these Government promissory notes or this payment for Kustoor Chand Daga as guardian of the infant plaintiffs. The power-of-attorney probably has reference only to Kustoor Chand Daga's business. So far as the Government promissory notes are concerned, order XXI, rule 31, requires delivery of the specific moveable to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf. That points, in my opinion, to a special authority for the particular purpose. It is noticeable that Madan Gopal Daga has not come forward to say what power, if any, he holds from Kustoor Chand Daga, nor has he made any affidavit in this case.

For these reasons, I am of opinion that the execution proceedings cannot be supported and must be set aside *ab initio*. A question was raised by the Deputy Sheriff as to the Sheriff's right of poundage, and he asked by his counsel that the property

attached might not be ordered to be restored to the defendants without notice to him and his being heard. If I had any doubt in the matter I might perhaps have taken that course, but I am unable to see that the Sheriff is entitled to poundage in this case. In the list of fees and charges to be allowed to the Sheriff, I find No. 21, "Poundage on sums levied by the Sheriff in execution for the first 1,000 rupees at 5 per cent. and for the rest at $2\frac{1}{2}$ per cent." The same rule applies in England, and it is clear that the Sheriff is only entitled to poundage on sums levied. Here there has been no levy, only a seizure of the defendants' effects; and the authorities are clear that where the seizure is wrongful and is withdrawn by direction of law the Sheriff receives no poundage: *Mortimore v. Cragg* (1), *In re Ludmore* (2), and *In re Thomas* (3). In any case I fail to see how the defendants' property, which is to be released, could be made liable for the Sheriff's poundage. I do not think, therefore, that I should be justified in ordering the property, or any part of it, to be detained in Court pending an investigation of the Sheriff's claim. He has his remedy by suit, if he be advised to bring one.

I accordingly make the rule for amendment of the decree absolute, with this correction that the clause to be inserted must come in its proper place after the directions to endorse and deliver the Government promissory notes, but applying of course to both sets of Government promissory notes. As the omission of this provision in the decree was due as much to the fault of one party as of the other, each party must bear their own costs of this rule.

The rule for the setting aside of the attachment is also made absolute, with costs against the plaintiffs. The property seized must be restored to the defendants.

Attorney for the plaintiffs: *N. C. Bose.*

Attorneys for the defendants: *Morgan & Co.*

R. G. M.

(1) (1878) 3 C. P. D. 216.

(2) (1884) 13 Q. B. D. 415.

(3) [1899] 1 Q. B. 460.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

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*Title, suit for—Partition—Jurisdiction of Civil Court—Permanent tenure—
Estates Partition Act (Beng. VIII of 1876) ss. 7, 111, 149.*

The plaintiffs and the defendants were co-owners of a certain *taluk*. In the course of proceedings under the Estates Partition Act (Beng. VIII of 1876), the plaintiff raised a claim to a *miras*, or permanent tenure, in respect of certain lands comprised in the said *taluk*. The Revenue Officer held in favour of the defendants that the plaintiff's title to the *miras* was not established. Thereupon, the plaintiff sought relief in the Civil Court, asking that his title to the *miras* be declared. The contention raised on behalf of the defendants appellants was that the order of the Revenue Officer was made under s. 111 of the said Act, and that the suit was not maintainable by reason of s. 149 of the same Act :—

Held, that s. 111 of the Act provided for cases of permanent intermediate tenures, and prescribed the mode in which partition was to take place when the fact of such permanent tenures was established, and had no application to the present case; and that a suit for declaration of title to the permanent tenure was maintainable, the object of s. 149 being not to exclude the jurisdiction of the Civil Court in matters which involved a question of title.

Ananda Kishore Chowdhry v. Daije Thakurain (1), referred to.

Held, further, that if in the course of a partition proceeding under Bengal Act VIII of 1876, any question arose as to the extent or otherwise of the tenure, the tenure-holder not being a party to the proceedings, he was not affected in any manner by the decision which might be arrived at by the revenue authorities for the purpose of partition between the proprietors. It would be unreasonable to hold that a party who appeared before the revenue authorities in his character as a proprietor should be finally concluded by a decision upon a question of title, which would not have been binding upon him, if he had been a stranger to the proceedings.

Where the tenant based his title to the permanent tenure on the existence of the tenure for 75 years and more, prior to the institution of his suit for declaration of his title, and on his purchase and possession from the date

* Appeal from Appellate Decree, No. 1044 of 1907, against the decree of Durga Charan Sen, Subordinate Judge of Dacca, dated Feb. 25, 1907, affirming the decree of Siddheswar Chakrabarti, Munsif of Manikgunge, dated Feb. 27, 1903.

of his purchase up to the date of the partition proceedings under the Estates Partition Act :

Held, that under the circumstances the tenancy was a permanent one.

Niratan Mandal v. Ismail Khan (1), *Naba Kumari Debi v. Behari Lal Sen* (2) referred to.

Abdul Wahed Khan v. Shaluka Bibi (3), distinguished.

The only effect of such a decree is to decide that the tenure is permanent, and the question as to whether the rent is or is not fixed in perpetuity is left open for decision in a suit properly framed for the purpose.

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SECOND APPEAL by the defendants, Janaki Nath Chowdhry and others.

The facts are as follows. The plaintiff, Kali Narain Roy Chowdhry, and the defendants were the co-owners of a certain *taluk*, with respect to which partition proceedings were instituted under the Estates Partition Act (Beng. VIII of 1876). In the course of these proceedings the plaintiff set up his title to a portion of the lands comprised in the said *taluk* as *mirasdar* or permanent tenure-holder. The defendants disputed this title, and the Collector held that the *miras* was not established. Thereupon, the plaintiff brought a suit against the defendants in the Civil Court for declaration of his title to the *miras*, and in support of his contention based his title to the tenure as a permanent tenure-holder on the existence of the tenure for 75 years and more prior to the present suit. He further contended that he had purchased the tenure from an Indigo concern in 1879, and though a suit was instituted against the plaintiff by the proprietors in respect of a *raiyati* holding purchased by him at the same time from the Indigo concern, and a decree for ejectment was made in 1880 in favour of the proprietors against the plaintiff in respect of the *raiyati* holding, the plaintiff had remained in undisturbed possession from the date of his purchase up to the time when, in the partition proceedings, the existence of his tenure was denied by his co-sharers, the defendants.

The Court of first instance decreed the plaintiff's suit in his favour. The defendants appealed, with the result that

(1) (1904) I. L. R. 32 Calc. 51. (2) (1907) I. L. R. 34 Calc. 602.

(3) (1893) I. L. R. 21 Calc. 496.

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the Subordinate Judge held that the suit was barred under the Limitation Act, Schedule II, Art. 14. On appeal to the High Court this decision was set aside, and the suit was remanded to the Subordinate Judge, who affirmed the decision of the Court of first instance. Whereupon, three of the defendants appealed to the High Court, contending that the order of the Revenue Officer was made under section 11 of the Estates Partition Act, and that the suit was not maintainable by reason of the provisions of section 149 of the same Act, and further, that the facts found were not sufficient to justify the inference that the tenure alleged by the plaintiff was of a permanent character and extended over the whole of the land in dispute.

Babu Jogesh Chandra Roy (with him *Babu Haran Chandra Banerjee*), for the appellants. In the proceedings before the Revenue Officer, the permanency of the tenure with respect to certain lands was alleged by the plaintiff to be existent, but was held by the officer as not established: so that there was no permanent tenure existing at the time of the plaintiff's suit. The plaintiff, therefore, is not entitled to come to the Civil Court and ask for declaration of his title with respect to such tenure after this decision of the Revenue Court. Section 111 of the Estates Partition Act is conclusive against him. Furthermore, his suit is barred by section 149 of the same Act. As regards the permanent character of the tenure existing or not, with reference to the lands in suit, the question is a mixed one of law and fact. The tenure is not of a permanent character. The absence of documents declaring such lands a permanent tenure is admitted, and, further, the defendants have denied the existence of the tenancy; moreover, there was no recognition of the tenancy by them in the rent receipts produced on behalf of the plaintiff. If it be maintained that the defendants acquiesced in the plaintiff erecting permanent structures, such acquiescence merely does not establish the permanent character of the tenure. The onus is, therefore, on the plaintiff to show not only that the tenure was permanent, but, in order to be permanent, that its boundaries should have been defined

and its rent fixed in perpetuity. The facts found here are insufficient for inferring that the land was a permanent holding. Permanency can only be attributable to the actual land occupied by the *pucca* structures. As to how far the period of existence of the tenure and the erection of *pucca* structures thereon would aid in establishing the permanency or otherwise of the tenure, see *Upendra Krishna Mandal v. Ismail Khan Mahomed* (1), *Naba Kumari Debi v. Behari Lal Sen* (2), *Abdul Wahid Khan v. Shaluka Bibi* (3), *Prosunno Coomaree Debea v. Sheikh Rutton Bepary* (4), *Gungadhur Shikdar v. Ayimuddin Shah Biswas* (5), *Beni Ram v. Kundan Lall* (6), *Mahim Chandra Sarkar v. Anil Bandhu Adhicary* (7).

Mr. B. Chakravarti (with him *Babu Baikuntha Nath Das*), for the respondent, was called upon to address the Court only on the question whether, on the evidence, the respondent had the right to hold the land at a fixed rate of rent.

MOOKERJEE AND TEUNON JJ. The plaintiff respondent commenced the action out of which this appeal arises for declaration of his title as a *mirasdar* in respect of five *khadas* and fifteen *pakis* of land. The plaintiff and the defendants are co-owners of a *taluk* within which the disputed land is comprised. The first and the third defendants are proprietors of the superior interest to the extent of four annas; the second defendant owns another four annas; the fifth and the sixth defendants claim four annas, and the remaining four annas belong to the plaintiff and the fourth defendant. In the course of proceedings for partition of the estate by the Revenue authorities under Act VIII of 1876, the plaintiff alleged that he was in occupation of the disputed land not as proprietor, but as *mirasdar* under the entire body of landlords. This allegation was challenged by the co-proprietors of the plaintiff, and the result was a summary investigation by the Collector,

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(1) (1904) I. L. R. 32 Calc. 41.

(2) (1907) I. L. R. 34 Calc. 902.

(3) (1893) I. L. R. 21 Calc. 496.

(4) (1877) I. L. R. 3 Calc. 696.

(5) (1882) I. L. R. 8 Calc. 960.

(6) (1899) I. L. R. 21 All. 496;

L. R. 26 I. A. 58.

(7) (1909) 9 C. L. J. 362.

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who came to the conclusion that the *miras* set up by the plaintiff was not established. The plaintiff, thereupon, commenced this action for declaration of the alleged *miras* title, and he has met with varying fortune in the course of the litigation. The Court of first instance made a decree in his favour. Upon appeal, the Subordinate Judge came to the conclusion that the suit was barred by limitation under Art. 14 of the second schedule of the Limitation Act. This decision was subsequently set aside by this Court on the ground that the suit was not one to set aside any order of a Revenue Officer within the meaning of that Article. On remand, the Subordinate Judge found on the merits in favour of the plaintiff and affirmed the decision of the Court of first instance. Three of the defendants have appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed on two grounds; namely, *first*, that the suit is not maintainable by reason of the provisions of section 149 of the Estates Partition Act (VIII of 1876, B. C.); and, *secondly*, that the facts found are not sufficient to justify the inference that the tenure alleged by the plaintiff was of a permanent character and extended over the whole of the land in dispute.

In support of the first contention, reliance has been placed upon section 111 of Act VIII of 1876 as the section under which the order of the revenue authorities was made. In our opinion, there is no foundation whatever for this contention; section 149 provides that no order of a Revenue Officer made under Part IV, V, VI, VII, VIII or IX shall be liable to be contested or set aside by a suit in any Court or in any manner other than that expressly provided in that Act. The learned vakil for the appellant has suggested that the order of the Revenue Officer, holding that the tenure set up by the plaintiff had no existence, was made under section 111 which is comprised in Part VIII of the Act. Section 111 provides for cases of permanent intermediate tenures, and prescribes the mode in which partition is to take place when the fact of such permanent tenures is established. The section lays down that whenever the Deputy Collector shall find in the parent estate any lands

which are held at a fixed rent, or a *putni*, or other permanent intermediate tenure falling within exception 2 or 3 of section 7, the Deputy Collector is to take certain action. When we turn to section 7, it becomes obvious that exception 2 has no possible application. The only provision which can have any application to the present case is the third exception, which provides as follows: "If any land is held on a tenure which, although not protected as aforesaid, is admitted by all the recorded proprietors of the estate to be a permanent tenure created by all the proprietors of the estate, subject only to the payment of an amount of rent fixed in perpetuity, and of such a nature that the rent thereof is not liable to be enhanced under any circumstances by the proprietor of the said estate, or any person deriving his title from such proprietors, the rent payable by the holder of such tenure (whether he be known as talukdar, putnidar, mukararidar, or by any other designation) shall be deemed to be the rental of such land." It is obvious, from the phraseology of this exception, that it is applicable only to cases where the existence of the tenure is admitted by all the recorded proprietors of the estate, and it is by common consent allowed to be a permanent tenure subject to payment of rent fixed in perpetuity. In the case before us, it is not admitted at all that there is a permanent tenure, much less is it admitted that the rent of the tenure is fixed in perpetuity. It is clear, therefore, that section 111 has no application. There is, however, another consideration which proves conclusively that section 111 cannot possibly apply. The Deputy Collector has authority to take action under section 111 only when he finds that in the parent estate there are situated lands held at a fixed rent. If the Deputy Collector finds that there is no such tenure as is alleged by one of the parties, he cannot take action under section 111. The order of the Deputy Collector, therefore, in the present case cannot be treated as one made under section 111.

It has next been sought to be argued upon general principles that as there has been a decision by the revenue authorities against the plaintiff as to the reality and extent of this tenure, it is not open to the plaintiff to have the matter reagitated in a

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Civil Court. No authority has been shown in support of this proposition. On the other hand, there are obvious and weighty reasons upon which such a contention ought to be overruled. It is manifest that if, in the course of a partition proceeding under Act VIII of 1876, any question arises as to the extent or otherwise of the tenure, as the tenure-holder is not a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the revenue authorities for the purposes of partition between the proprietors. It is merely an accident that, in the case before us, the tenure is set up by a person who is also a proprietor and is a party to the proceedings in that character. It would, in our opinion, be unreasonable to hold that a party who has appeared before the revenue authorities in his character as a proprietor, should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings. The learned vakil for the appellant has suggested that section 149 bars a suit of this description ; but this contention is obviously unsound, because, as pointed out by this Court in the case of *Ananda Kishore Chowdhry v. Daije Thakurain* (1), the object of section 149 is to exclude the jurisdiction of the Civil Court in cases where the question relates to the decision of the Government revenue or to the details of the partition. We are unable to hold that the policy which underlies section 149 is to exclude the jurisdiction of the Civil Court in matters which involve a question of title. The result, therefore, is that the first ground upon which the decision of the Subordinate Judge has been assailed must be overruled.

In support of the second contention urged on behalf of the appellants, it has been argued that the facts are not sufficient to justify the inference of the Subordinate Judge that the tenure was of a permanent character. Now, the facts found are these : the tenure has been in existence for at least 75 years before the commencement of the suit ; its origin is unknown, but it appears to have been created in favour of an Indigo concern, the proprietors of which erected substantial structures

(1) (1909) I. L. R. 36 Calc. 726.

on about an one-fifth portion of the land comprised in the tenancy; the Indigo concern was in occupation of the land for about half a century, till the 28th February 1879, when they transferred the tenure to the present plaintiff. Shortly after this transaction, the plaintiff was sued by the proprietors in respect of a *raiyati* holding purchased by him at the same time from the Indigo concern. That action was commenced on the ground that, as the lands of the holding were not transferable, he had not acquired a valid title by his purchase. On the 7th June 1880, a decree for ejectment was made in favour of the proprietors against the plaintiff in respect of this *raiyati* holding. The plaintiff, however, has been left in undisturbed possession of the lands of the tenure from the date of his purchase up to the time when, in the partition proceedings, the existence of the tenure was denied by his co-sharers. We may further state that in the conveyance executed in favour of the plaintiff, his vendors asserted that they had a *miras* right in respect of the land now in dispute, and the boundaries of the land comprised in the *miras*, as also of the land included in the *raiyati* holding, were set out in detail in different schedules. Under these circumstances, the inference is perfectly legitimate that the tenure was of a permanent character. This view is amply supported by the decision of the Judicial Committee in the cases of *Niratan Mandal v. Ismail Khan* (1) and *Naba Kumari Debi v. Behari Lal Sen* (2). The learned vakil for the appellant has, however, contended that it would not be proper to hold that the tenure was of a permanent character, inasmuch as there was no recognition of the tenancy by the appellants in the rent receipts produced on behalf of the plaintiff; and, further, that the mere acquiescence of the landlord in the erection of a permanent structure by the tenant does not show that the tenancy was of a permanent character. In our opinion there is no force in either of these contentions. No question of recognition arises in the case before us. The sole point in controversy is whether, from the events which have happened, the inference may legitimately be drawn that the tenancy in its

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inception must have been of a permanent character. To that question only one answer is possible. No question also of any acquiescence arises in the present case. The learned vakil for the appellant invited our attention to the decision of the Judicial Committee in the case of *Abdul Wahid Khan v. Shaluka Bibi* (1), in which a decree for ejectment was made against the tenant, although he had been for several years in possession of his tenancy and had erected substantial structures thereon. That case, however, is obviously distinguishable, because there the terms of the tenancy were known, as the original grant was produced, and what their Lordships held was that if the tenancy was of a temporary character, the mere circumstance that the tenant with full knowledge of his limited rights had erected substantial structures thereon, would not enable him to resist successfully a decree for ejectment in favour of the landlords. Under these circumstances, we must hold that the view taken by the Subordinate Judge as to the nature of the tenancy is correct.

A question has been raised as to the precise effect of the decree made in favour of the plaintiff. In the first prayer clause, the plaintiff had asked for a declaration, not only that the tenancy was a permanent one, but also that the rent was fixed in perpetuity. The facts found by the Court below, however, though they justify the inference that the tenancy was of a permanent character, do not support the conclusion that the rent was not liable to enhancement. In reality, this part of the case was not made the subject of discussion in either of the Courts below. We, therefore, declare that the only effect of the decree in favour of the plaintiff is to decide that the tenure is permanent, and the question as to whether the rent is or is not fixed in perpetuity is left open for decision in a suit properly framed for the purpose.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

O. M.

(1) (1893) I. L. R. 21 Cal. 496.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

NILMANTI GHATAK

v.

EMPEROR.*

1910
March 17.

*Encroachment—Bengal Local Self-government Act (Beng. Act III of 1885) s.140—
Infringement of bye-law—Erection of fence on the slope and edge of a road
without impeding the passage along it—Continuing Offence—Daily Fine.*

Where a bye-law passed by the District Board prohibited encroachment on any part of a road maintained by it, or its slopes or side-ditches, by the placing of fences thereon :

Held, that the erection of a fence along the slope and the edge of such road, without impeding the passage over it, is an infringement of the bye-law, though the Board has no proprietary right in the road, or in the land on which its slopes or side-ditches stand.

A sentence of a daily fine in anticipation, in the case of a continuing offence which may be committed after the date of the proceeding in which it was passed, is illegal.

THE petitioner, a District Court pleader, purchased by two *kobalas*, in 1898 and 1900, about 60 bighas of land comprised in two holdings in mouza Ramchandrapur with the fruit and other trees and the bamboo *topes* standing thereon. The trees were mostly on the edge of the slopes of a high embankment running through a part of his holdings. The Rajmehal Road, which was maintained by the District Board of Malda, runs along the crest of the embankment. The petitioner erected a fence, in May and June 1907, 300 feet long, partly on the slope and partly on the edge of the road on the south side so as to enclose the trees. After considerable correspondence between him and the District Board, a prosecution was instituted against him for infringement of section 4 of the Bye-laws framed by the District Board and confirmed by the Local Government, and published for general information in Notification No. 6014

* Criminal Revision No. 111 of 1910 against the order of F. C. Chatterjee, Deputy Magistrate of Malda, dated Dec. 30, 1909.

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L. S. G., dated 6th October 1898, which was in the following terms :—"No person shall . . . encroach on any part of a road, its slopes or side-ditches by placing a fence. . . . thereon." The breach of the rule was punishable, under section 17 thereof, with a fine not exceeding Rs. 10, or, in the case of continuing offences, with a fine not exceeding Rs. 10 for each day during which such offence was continued after conviction for such breach.

The petitioner was put on his trial before the Deputy Magistrate of Malda, and convicted and sentenced, on the 30th December 1909, to a fine of Rs. 10. He was further ordered to remove the fence within 7 days, and in default to a daily fine of Rs. 2 until compliance with the order within the next fifteen days. The petitioner then moved the High Court and obtained the present rule.

Mr. Chaudhuri and Babu Jogendranath Mookerjee, for the petitioner.

Babu Dasharathi Sanyal and Babu Debendra Narain Bhatta-charjee, for the opposite party.

STEPHEN AND CARNDUFF, JJ. The petitioner in this case has been convicted of an offence under a bye-law made under section 140 of the Bengal Local Self-government Act, 1885. He has been fined in respect of a continuing offence. The bye-law on which the proceedings are based, is that, "no person shall damage or encroach on any part of a road, its slopes or side-ditches by," among other things, "placing a fence thereon."

We have granted a rule to show cause why the conviction of the petitioner should not be set aside on the ground that the land alleged to have been encroached on is not such a road or roadside land or slope as is contemplated by the Act and the bye-laws framed thereunder.

The question of fact, which the Court below has decided, is whether the fence, which has admittedly been constructed, stands on the slope of the Rajmehal road. Reviewing a considerable body of evidence with apparently considerable

discretion, the Court has found that the present fencing stands on the District Board roadside land, and has added a further direction which is immaterial to the present purpose. On considering the facts on which this finding is based, and on looking at the evidence on the record, we see no reason at all to differ from this view of the case.

It is argued before us that the bye-law must be considered as confined to cases in which the encroachment impedes the passage along the highway. We cannot find any authority in the Act or in the bye-law for any such view, and such a view is certainly contrary to the plain terms in which the bye-law is expressed. It may be taken for the present purpose as admitted that the District Board has no proprietary right in the road or in the land on which its slopes or side-ditches stand, and that its rights are confined, for the purpose of this case, to maintaining the road. It is, however, empowered to make bye-laws for this purpose. It has made a bye-law which prohibits any encroachment on the slope of a road, and the validity of that bye-law is not now in question. Consequently, any such encroachment as this is held, on good evidence, to be an offence.

The result is that the conviction cannot be disturbed. The fine imposed in respect of the continuing offence, which may be committed after the date of the proceeding, is, however, illegal, and consequently this much of the sentence is set aside: otherwise the rule is discharged.

Rule discharged.

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APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

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April 4.

RAM CHANDRA SINGH

v.

BHIKHAMBAR SINGH.*

Grant—Maintenance Grant—Limitation—Tenancy by sufferance—Limitation Act (XV of 1877), Sch. II, Art. 139.—Grantor and Grantee—Adverse possession.

A tenancy by sufferance would not by itself make the possession of the holder rightful, so as to prevent limitation from running; but if the landlord, or the person entitled to resume the tenancy, does anything to indicate his assent to the continuance of the tenancy, that would itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year, and in such a case the limitation applicable is that provided by Article 139 of the second Schedule to the Limitation Act.

SECOND APPEAL by the defendants, Ram Chandra Singh and others.

This appeal arose out of a suit brought by the plaintiff for resumption of a *khorphosh* grant. The plaintiff alleged that he was the zemindar of Pargana Joypur, which was an impartible estate, and according to the custom of the family in which the rule of primogeniture prevailed, he being the eldest member, succeeded to the entire estate; that the defendants' father, Hikim Gopal Singh, obtained a *khorphosh* grant of a mouzah from his grandfather, Raja Madan Mohan Singh; that such a grant was resumable either on the death of the grantor or of the grantee; that the grantor, Raja Madan Mohan Singh, was dead, and the grantee, who was the father of the defendants, was also dead; that the defendants, notwithstanding that they were asked repeatedly to give up the land, did not do so, and hence the present suit was brought.

* Appeal from Appellate Decree, No. 1285 of 1907, against the decree of W. H. Vincent, Judicial Commissioner of Chota Nagpur, dated April 6, 1907, confirming the decree of Mahim Chandra Sircar, Subordinate Judge of Manbhoom, dated July 16, 1906.

The defendants pleaded, *inter alia*, that the suit was barred by limitation, and that they held the disputed mouzah in their *lakheraj* right.

The Court of first instance having held that the grant was a *khorphosh* grant, and that the suit was not barred by limitation, as the defendant's father and afterwards the defendants were allowed to remain in possession of the disputed mouzah after the death of the original grantor, decreed the plaintiff's suit. On appeal, the decision of the Court of first instance was affirmed by the learned Judicial Commissioner of Chota Nagpur. Against this decision the defendants appealed to the High Court.

Dr. Rashbehari Ghose (with him *Babu Golap Chandra Sarkar* and *Babu Kshettra Mohan Sen*), for the appellants. As the suit was not instituted within 12 years from the death of the grantor, or even within 12 years from the death of the grantee, the suit was barred by limitation. Article 140 of Schedule II of the Limitation Act applied to the case, and limitation commenced to run from the date of the death of the father of the defendant, from which date plaintiff's father became entitled to the property as the reversioner, and his reversion then became an estate in possession. Plaintiff's father allowed the tenant to hold over without any fresh agreement, and the mere fact that we were allowed to do so did not convert the wrongful possession into a rightful one to prevent limitation running against the lessor: see *Darby and Bosanquet on Limitation*, pp. 375, 378, and *Foa on Landlord and Tenant*, page 21; *Madan Mohan Gossain v. Kumar Rameswar Malia* (1), *Chandri v. Daji Bhau* (2), *Kantheppa Raddi v. Sheshappa* (3) and *Hellier v. Sillcox* (4). The grant was not a *khorphosh* grant, but a *lakheraj* grant. Even if it were a *khorphosh* grant, it could not have been anything more than a grant during the lifetime of the grantee: see *Mayne on Hindu Law*, page 524, and *Mohim Chandra Moulik v. Sarajubala Gupta* (5).

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(1) (1907) 7 C. L. J. 615, 626.

(3) (1897) I. L. R. 22 Bom. 893.

(2) (1900) I. L. R. 24 Bom. 504.

(4) (1850) 19 L. J. Q. B. (N.S.) 295.

(5) (1809) 9 C. L. J. 578

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Mr. Hill (with him *Babu Surendra Chandra Sen* and *Babu Naliniranjan Chatterji*), for the respondent. The grantee was a tenant of the grantor, and the evidence shows that he was responsible for the cesses, etc. : he thus comes within the meaning of 'tenant' in section 3 of the Bengal Tenancy Act ; and the case is governed by Article 139 of Schedule II of the Limitation Act. A tenancy by sufferance does not by itself make the possession of the holder rightful so as to prevent limitation from running, but the tenancy by sufferance becomes converted into a tenancy from year to year when there is the assent of the landlord to the continuance of the tenancy ; and so Article 140 is not applicable. I rely on the cases of *Beni Pershad Koeri v. Dudhnath Roy* (1) and *Krishnaji Ramchandra v. Antaji Pandurang* (2). Whether the grant was a *khorphosh* grant or not is a question of fact, and cannot be argued in second appeal.

Babu Golap Chandra Sarkar, in reply.

Cur. adv. vult.

BRETT AND SHARFUDDIN JJ. The present appeal arises out of a suit brought by the plaintiff to recover possession of lands which were given by way of *khorphosh* or maintenance grant by Raja Madan Mohan Sinha, the grandfather of the plaintiff, to Hikim Gopal Sinha, the father of the defendants. Raja Madan Mohan Sinha had three sons, of whom the eldest was the plaintiff's father, and the second was Hikim Gopal Sinha, the father of the defendants. Under the custom observed in the Raj family of Joypore, the entire zemindary passed by the law of primogeniture, on the death of the Raja, to his eldest son, and grants by way of maintenance were made to the younger sons. Raja Madan Mohan died in 1858. The defendants' father, the original grantee, Hikim Gopal Sinha, died in 1877, and the plaintiff's father, Raja Kasi Nath Sinha, died in 1885. The present suit was instituted on the 14th June 1905.

The case for the plaintiff was that maintenance grants being for the support of the individual to whom they were made, ter-

(1) (1899) I. L. R. 27 Cal. 156.

(2) (1893) I. L. R. 18 Bom. 256.

minated on the death of either the grantee or the grantor. Ordinarily, therefore, the grant of the lands in suit to the father of the defendants would have terminated in 1858 or 1877. But the case of the plaintiff was that, after the death of Raja Madan Mohan, Raja Kasi Nath, the father of the plaintiff, out of affection for his brother, allowed him to remain in possession of the lands in suit, and when Hikim Gopal Sinha, the father of the defendants, died in 1877, Raja Kasi Nath allowed the defendants to continue in possession; and that after the death of Raja Kasi Nath in 1885, the present plaintiff, Raja Bhikhambar Sinha, allowed the defendants to continue in possession. Lately, however, they had become adverse to the plaintiff, and, therefore, the plaintiff sought to resume the grant and to recover possession of the property covered by it.

The main defence set up by the defendants was that the grant was not a *khorphosh* grant at all, but that the defendants and their father held the lands all along in jote *lakhiraj* right.

Both the lower courts held that the case of the plaintiff was true, that the grant was a *khorphosh* or maintenance grant, and that the suit was not barred by limitation, as the defendants' father and afterwards the defendants had been allowed to remain in possession of the land covered by the grant after the death of the original grantor and after the death of the defendants' father respectively.

The defendants have appealed to this Court, and the main point which has been argued before us is whether the suit is barred by limitation. It has been contended that, after the death of the defendants' father, the *khorphosh* or maintenance grant, which created an estate for life only, came to an end, and the father of the plaintiff, as the reversioner, became entitled to the property, as his reversion then became an estate in possession; and it has been argued that Article 140 of the second Schedule of the Limitation Act applies to the case, that limitation commenced to run from the date of the death of the defendants' father, and that, as the suit was not brought within twelve years from that date, it was barred by limitation. Reliance has been placed on the decision of this Court in the

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case of *Madan Mohan Gossain v. Kumar Rameswar Malia* (1) to support the view that, if a lessee holds over after the expiry of the lease, time begins to run under Article 139 of Schedule II of the Limitation Act from the date of the expiry of the lease, and the cases of *Kantheppa Raddi v. Sheshappa* (2) and *Chandri v. Daji Bhau* (3) are also referred to as supporting the same principle. It has also been argued that the mere fact that the plaintiff's father allowed the father of the defendants and afterwards the defendants to remain in possession would not have the effect of converting their possession, which was wrongful, into rightful possession, so as to prevent limitation from running against the lessor, and it has been contended that the suit on this ground was barred by limitation. It has further been contended that the lands in suit were held by the defendants' father, and afterwards by the defendants, not as a maintenance grant, but as a *lakheraj* grant, and that this view is supported by Exs. A, B and C, three letters written by Raja Kasi Nath and the plaintiff to the defendants' father and to the defendants.

We have given our best consideration to these arguments, and we are of opinion that they cannot be maintained. In our opinion, the grant of lands made by the grandfather of the plaintiff to his son, the father of the defendants, was a grant of a tenure for the purpose of supporting the defendants' father out of its profits, such tenure to be held free of rent. Whether the grant would ordinarily be resumable on the death of the grantee or of the grantor would, in our opinion, be immaterial, if, after either of these events, anything occurred to indicate that the grantor or his successor acknowledged the person in possession of the tenure as entitled to continue in possession and enjoy the profits. We are prepared to admit that a tenancy by sufferance would not by itself make the possession of the holder rightful, so as to prevent limitation from running; but, at the same time, we are of opinion if the landlord or the person entitled to resume the tenancy does anything to indicate his assent to the continuance of the tenancy, that would itself

(1) (1907) 7 C. L. J. 615.

(2) (1897) I. L. R. 22 Bom. 893.

(3) (1900) I. L. R. 24 Bom. 504.

be sufficient to convert the tenancy by sufferance into a tenancy from year to year. We think that, in the present case, there is sufficient indication that there was on the part of Raja Kasinath Sinha, and, subsequently, on the part of the plaintiff himself, such an assent to the continuance of the tenancy as would have the effect of converting the tenancy by sufferance into a rightful yearly tenancy. We think that the letters, Exs. A, B and C, are in themselves sufficient to indicate that there was such assent, and there is the further circumstance that the parties in this case are near relatives and, therefore, there was a strong reason why, on the death of the original grantor, his son should have allowed the grant of the tenure to continue to the original grantee, and on the death of the original grantor, the same person should have allowed the grant to continue to the present defendants. We are of opinion that the contention advanced on behalf of the defendants that the grant was a *lakheraj* grant and not a grant for maintenance cannot be supported. The question whether a grant is a maintenance grant or not is, moreover, in our opinion, a question of fact, which has been decided by the lower Courts on the evidence. We are of opinion, therefore, that the contention advanced on behalf of the appellants must fail, that the limitation applicable to this case is that provided by Article 139 of the second Schedule of the Limitation Act, and that Article 140 of the same Schedule has no application. We are of opinion that the lower Courts were right in the view which they took that the grant, by reason of the assent of the grandfather and the father of the plaintiff and the plaintiff himself, was continued to the defendants' father, and, after the death of the defendants' father, to the defendants, and, therefore, there was no adverse possession on their part which would be sufficient to bar the plaintiff's suit. We agree with the lower Courts that the plaintiff is entitled, in the circumstance stated, to the reliefs granted, and we, therefore, dismiss the appeal with costs.

Appeal dismissed

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CRIMINAL REFERENCE.

Before Mr. Justice Harington and Mr. Justice Holmwood.

1910
April 21.

KOKAI SARDAR

v.

MEHER KHAN.*

Acquittal—Previous acquittal, plea of—Acquittal of some accused charged with rioting, grievous hurt and murder—Liability of others to be tried for the same offences—Prosecution story found to be false as to the grievous hurt and murder—Criminal Procedure Code (Act V of 1898) s. 403.

An acquittal of some of the accused on charges of rioting armed with deadly weapons, grievous hurt and murder, is no bar, under s. 403 of the Criminal Procedure Code, to the trial of others concerned in the same offences.

Where the Sessions Judge was of opinion, at the original trial, that the prosecution story as to the manner in which the deceased met his death, did not represent the truth and acquitted the accused, though he did not disbelieve the fact of a rioting having occurred, while one of the Assessors believed the whole story :—

Held, that the High Court would not interfere with a pending prosecution against others for the same offences.

Bishun Das Ghosh v. King-Emperor (1) distinguished.

ONE Meher Khan lodged a complaint before the police, on the 28th April 1909, charging the five petitioners and several others, under sections 148, 326 and 302 of the Penal Code, with rioting armed with deadly weapons, grievous hurt and murder of one Chattri Lal. Three accused persons, Isop Sheik, Amir Sardar and Tasiruddi Khondkar, were arrested and sent up for trial, but were ultimately acquitted by the Sessions Judge of Faridpur and one of the two assessors. The finding of the Judge was that, though the circumstances pointed to the conclusion that the deceased had met his death at or near the place alleged by the prosecution, his death was caused under quite different circumstances, and that the prosecution story in this respect did not represent the

* Criminal Reference No. 52 of 1910, by J. F. Graham, Sessions Judge of Faridpur, dated March 3, 1910.

(1) (1902) 7 C. W. N. 497

truth. Subsequently an order was passed, on the 8th October, by the District Magistrate, directing the prosecution of the petitioners who were named in the First information as concerned in the occurrence, but had absconded, and they were arrested and sent for trial before a Deputy Magistrate, in whose Court the case was pending. The petitioners then moved the Sessions Judge of Faridpur to refer the case to the High Court with a recommendation that the order for prosecution should be quashed, on the ground that the case had already ended in an acquittal before a competent Court which had found the case to be false. It appeared that the question of an appeal by the Local Government from the original order of acquittal was considered and abandoned, the District Magistrate deciding to proceed against the present petitioners instead.

The learned Judge made the reference on the 3rd March 1910, being of opinion that the order of the District Magistrate was bad, as it was not competent for him to direct the prosecution of the petitioners until the judgment of the Sessions Court, acquitting the co-accused and declaring the case to be untrue, was not set aside.

Mr. Chaudhuri and Babu Hara Kumar Mitter, for the complainant.

Mr. Morrison and Moulvi Nurudin Ahmed, for the petitioners.

HARINGTON AND HOLMWOOD JJ. This is a reference by the learned Sessions Judge of Faridpore. He has referred to us an order of the District Magistrate, dated the 8th October last, directing the prosecution of the petitioners in order that that order may be reversed. The grounds on which this Court is applied to are as follows. It appears that one Golam Imam and 19 others were charged with offences under sections 148, 326 and 302. Three of these persons were placed on their trial and acquitted. Six of the persons alleged to be implicated in the transaction ran away, and out of these six, five appear now to have been captured and are the petitioners in the present reference, and the ground on which we are asked to

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interfere with the order of the District Magistrate is this: that the Sessions Judge having disbelieved the evidence in the case brought against the three persons who have been acquitted, and having expressed an opinion that the facts and circumstances suggested to him a very strong doubt as to the truth of the story, and he having come to the conclusion that the deceased met with his death under different circumstances, and that the story told by the prosecution before the Court did not represent the truth, this Court should say that these remaining five persons must not be prosecuted.

Now, it is conceded by the learned counsel who supports the reference that there is no provision of law which renders the prosecution of these persons illegal; but it is said that we have a power, which we can exercise, to set aside the order of the District Magistrate, notwithstanding that no provision of law makes that order an illegal order, and reliance to support this proposition is placed on the case of *Bishun Das Ghosh v. King-Emperor* (1). Now, that case was a peculiar one. Five persons were indicted for various offences, which included the offence of unlawful assembly, as to which it was necessary that there should be five persons. Three out of the five were placed on their trial and were acquitted. The District Magistrate, though he came to the conclusion that the acquittal was a wrong one, did not move the Local Government to appeal against the acquittal to get it set aside, but he directed two other persons who were alleged to be the other two, making up the five, to be prosecuted under section 114, that is to say, for having abetted the offence of which the other three persons had been already acquitted; and the view that this Court took was that such prosecution, namely, that for abetment of the offence of which the others had been acquitted, ought not to proceed. That is all that was decided in that case, and in our opinion that case in no way governs the decision in the present case. In the present case, although the Judge acquitted the three persons, one of the assessors at least thought that the case was satisfactorily proved. That by no means shows that

(1) (1902) 7 C. W. N. 493.

it was a clear case as the learned counsel would have us hold. In any case, it is impossible to say that the prosecution of the five petitioners for taking part in this transaction would be unreasonable in view of what happened, though the three persons were acquitted. The five petitioners were not charged of abetting an offence, which it has been found had not been committed. There is no reason for supposing that in the learned Judge's judgment the riot did not take place which resulted in the death of one man. The result, therefore, is that this reference must be discharged, and the order of the District Magistrate must stand.

E. H. M.

Reference discharged.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

R. D. MEHTA

v.

GADADHAR RAI*.

1910

April 8.

Lessor and lessee—Transfer by lessee—Liability of lessee to pay rent after transfer—Privity of estate—Transfer of Property Act (IV of 1882) s. 103.

The duration of liability of a lessee to pay rent to the lessor lasts as long as his estate remains in his possession and no longer; and after an assignment of the lease, the privity of estate between him and the lessor ceases, and the assignee becomes liable for the rent.

SECOND APPEAL by the defendant No. 1, Mr. R. D. Mehta.

This appeal arose out of an action brought by the plaintiffs to recover rent and royalties due for certain coal lands. The plaintiffs alleged that these lands were originally leased out to a certain Banamali Banerjee by a *potta*, dated 23rd November 1895. The defendant No. 1, on the 19th September 1899, purchased the twelve annas share in the property in execution

* Appeal from Appellate Decree, No. 2262 of 1907, against the decree of W. H. Vincent, Judicial Commissioner of Chota Nagpur, dated July 22, 1907, affirming the decree of Mahim Chandra Ghose, Subordinate Judge of Purulia, dated Oct. 25, 1906.

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of a decree. It appeared that he (defendant No. 1) transferred it to defendant No. 2, and the remaining four annas share passed to defendants 3 to 6. The present suit was against all the defendants for the rents for the years 1312 B. S., and for royalties from 1st of Bysack 1310 to Cheyt 1312.

The defendant No. 1 denied all liability to pay rent claimed, on the ground that his liability ceased after the sale of his interest to the defendant No. 2.

The Court of first instance having overruled the objection of defendant No. 1, decreed the plaintiffs' suit. On appeal, the decision of the Court of first instance was affirmed by the learned Judicial Commissioner of Chota Nagpur.

Against this decision defendant No. 1 appealed to the High Court.

Dr. Rashbehary Ghosh (with him *Babu Manmatha Nath Mukherjee*), for the appellant. The cases of *Sasi Bhushun Raha v. Tara Lal Singh Deo Bahadur* (1) and *Kunhanujan v. Anjelu* (2) cited in the judgment of the Judicial Commissioner, have no application. They refer to the case of the lessee and assignee of his interest. They do not refer to a case when there is an assignment from the assignee of the original lessee. The defendant No. 1 is an assignee from the original lessee, but he has transferred his interest to defendant No. 2. Section 108, clause (j) of the Transfer of Property Act is quite clear. The original lessee is liable as well as the defendant No. 2, but not defendant No. 1: see also *Foa on Landlord and Tenant*, p. 427.

Babu Joy Gopal Ghosh, for the respondent. Here the Judicial Commissioner has found that the defendant No. 1 by his conduct has accepted the position and become subject to exactly the same liabilities which the original lessee was subject to. The previous decree of 1902 for rent against the defendant No. 1 determines the rights of the parties under the lease. The defendant No. 1 has given no evidence against it, and he is liable for the rent.

(1) (1895) I. L. R. 22 Calc. 494.

(2) (1889) I. L. R. 17 Mad. 296.

BRETT AND SHARFUDDIN JJ. This appeal arises out of a case which appears to have been disposed of in both the lower Courts on the pleadings of the parties. The plaintiff sued to recover rents and royalties in respect of certain coal lands which had been originally leased out to one Banwari Lal Banerjee by a lease, dated the 23rd November 1895. Subsequently, on the 19th September 1899, a twelve-anna share in the property passed to defendant No. 1 at a sale in execution of a decree. The defendant No. 1, in his written statement, alleged that on the 19th May 1905, he, by a registered conveyance, transferred his interest in the twelve-anna share to defendant No. 2. It also appears from the judgments of the lower Courts that the plaintiffs admitted that subsequent to that transfer they received rents for 1311 from defendant No. 2. The present suit was brought to recover from defendants Nos. 1 and 2 the rent and royalties for the year 1312. Defendant No. 1 denied all liability for this rent, on the ground that his liability for rent ceased after the sale in 1905 of his interest to defendant No. 2. Both the lower Courts have held that defendant No. 1 is liable. Defendant No. 1 has appealed to this Court.

The grounds on which the lower Courts seemed to have based their decisions are that in 1902 a suit was brought by the plaintiffs for arrears of rent, and a decree was obtained by them against defendant No. 1, and from this fact it is concluded that, because in that suit the plaintiffs succeeded in recovering rents from defendant No. 1, the relationship of landlord and tenant between them must be held to have been then established, and in consequence the onus in the present suit rests on defendant No. 1 to prove that that relationship has been subsequently brought to an end. The lower Appellate Court was further of opinion that under the provisions of section 108 of the Transfer of Property Act defendant No. 1 was still liable for the rent as lessee, in spite of the fact that he had transferred his interest in the lands to defendant No. 2.

In our opinion, the view taken by the lower Courts cannot be maintained. Clearly in 1902 defendant No. 1 was the transferee in possession, and as such there was a privity of estate

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between him and the plaintiffs, and on the basis of that privity the plaintiffs were entitled to recover rent in that suit from him. But in the year for which the present rent is claimed that privity had been determined by the conveyance to defendant No. 2. In these circumstances the plaintiff is certainly not in law entitled to recover rent from defendant No. 1. The section of the Transfer of Property Act on which the learned Judge relies supports the view contrary to that which he has adopted. That section, in clause (j), states that "the lessee may transfer absolutely, or by way of mortgage or sub-lease, the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it." The clause goes on to say that the "lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease." The section expressly lays down the liabilities of the original lessee as distinguished from the liabilities of the subsequent transferee. In the present case the liability for rent under the provisions of that section would still attach to the original lessee and also to the present transferee, defendant No. 2, in possession. The duration of the liability in a case like the present, as between the lessor and the assignee, is clearly set out in his Treatise on the Law of Landlord and Tenant by Foa at page 427. The author points out that "the liability of the assignee to the lessor being founded wholly upon privity of estate—and each successive assignee stands in this respect upon the same footing—it obtains as long as his estate lasts, and no longer." It is clear, therefore, that after defendant No. 1, the assignee had transferred his interest in the land to defendant No. 2, the privity of estate between him and the lessor ceased. In these circumstances, we are of opinion that the view taken by both the lower Courts is incorrect, and that their judgments and decrees must be modified. We accordingly decree the appeal and modify the judgments and decrees of both the lower Courts, and direct that the suit as against defendant No. 1 be dismissed with costs in all the Courts. So far as defendant No. 2 and the other defendants are concerned the decree is confirmed.

APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Doss.

AGARJAN BIBI

v.

PANAULLA.*

1910

May 6.

Landlord and Tenant—Transfer of a portion of a non transferable jote—Joint possession—Transfer, validity of.

The purchaser of a portion of a *raiya* jote which is not transferable without the landlord's consent, and where there is no finding of such consent, is not entitled to have joint possession of the jote.

It is open to tenants in occupation of a portion of the jote to question the validity of the transfer.

SECOND APPEAL by defendants Nos. 1 to 4.

This appeal arose out of a suit for possession of certain plots of land upon establishment of title therein. The allegations in the plaint were that the disputed lands belonged to the *raiya* jote of one Ghogan, who died leaving two sons, Kamal (the predecessor of defendants Nos. 1 to 4) and Jamal (the defendant No. 5), and four daughters (defendants Nos. 6 to 9). It was further alleged there that after Ghogan's death all the aforesaid heirs were in joint possession of the lands, that Jamal removed to a neighbouring village, leaving his son Riazuddin in his dwelling-house in possession of his four annas share in those paternal lands, and that subsequently the daughters sold their eight annas share in those lands to their brother, the defendant No. 5, Jamal, who, together with his own four annas share, sold twelve annas share of these lands to the plaintiffs. So the plaintiffs claimed twelve annas share in the disputed lands.

Defendants Nos. 1 to 4 alone contested the suit. They pleaded, *inter alia*, that as the jotes were not transferable by custom, the plaintiffs had acquired no right by their purchase.

*Appeal from Appellate Decree, No. 2265 of 1908, against the decree of Srish Chandra Mukherjee, Subordinate Judge of Tippera, dated June 19, 1908, modifying the decree of Lalit Mohan Bose, Munsif of Comilla, dated May 12, 1907.

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The Court of first instance found that the disputed lands formed a *raiyati jote* of the two brothers in equal moieties, and that Jamal and Kamal being joint tenants of the lands, Kamal could not hold them adversely to Jamal, who had thus eight annas share in these lands to convey, and that the defendants Nos. 1 to 4, the holders of the other eight annas share in these lands, could not be allowed to raise the question of non-transferability of Jamal's share. The Munsif, however, dismissed the suit, holding that the plaintiffs were benami-dars, and that as such were not entitled to sue for possession and declaration of title.

On appeal, the Subordinate Judge held that the plaintiffs purchased the lands for their own use and benefit and that they could maintain the suit. The Subordinate Judge (agreeing with the Munsif that the contending defendants were not entitled to dispute the question of non-transferability of Jamal's share) reversed the judgment and decree of the Munsif, and partially decreed the suit for possession in their purchased eight annas share in the disputed share, with proportionate costs against the defendants Nos. 1 to 4 in both Courts.

The defendants, Nos. 1 to 4, thereupon appealed to the High Court.

Babu Harendranarayan Mitra, for the appellants. The right of an occupancy *raiyat* is not a property that is transferable. It is a mere *personal* right to occupy only : *Bhiram Ali Shaikh Shikdar v. Gopi Kanth Shaha* (1). The fact that it has a marketable value does not confer on the transferee any right whatever. The decision in *Basarat Mandal v. Sabulla Mandal* (2) is not good law : see *Kali Nath Chakravarty v. Kumar Upendra Chandra Chowdhury* (3) and *Bibee Suhodra v. Maxwell Smith* (4). The defendants in this case, i.e., the appellants, are not mere trespassers. They are the co-sharers of the transferor. They could go over all parts of the land, and are responsible for the rent payable to the landlords for the entire holding.

(1) (1897) I. L. R. 24 Calc. 355.

(2) (1898) 2 C. W. N. CCLXXIX.

(3) (1896) 1 C. W. N. XII.

(4) (1873) 20 W. R. 139.

Babu Shashadhar Roy, for the respondents. The question of non-transferability can be raised only by the landlord or by the tenant himself when his holding is going to be sold in auction. A trespasser cannot raise the question. The appellants in this case are trespassers, for they cannot resist my suit for possession after partition: *Peary Mohun Mandal v. Radhika Mohun Hazra* (1). All decisions within the last twelve years are in favour of this view. *Basarat Mandal v. Sabulla Mandal* (2), cited for the appellant, is based on equity and ought to guide us in such cases. The defendant is not injured by my purchase: *Ambica Nath Acharjee v. Aditya Nath Moitra* (3), *Ayenuddin Nasya v. Srish Chandra Banerji* (4). These cases have been followed in *Hari Das Bairagi v. Uday Chandra Das* (5), *Samiruddin Munshi v. Benga Sheikh* (6) and *Haro Chandra Podder v. Umesh Chandra Bhattacharjee* (7). The old cases reported in the Weekly Reporter and cited for the appellants are distinguishable.

Babu Harendranarayan Mitra, in reply. The decisions cited by my friend are based on the principle of estoppel and are distinguishable.

Cur. adv. vult.

JENKINS C.J. The plaintiff-respondents have brought this suit for the joint possession of land.

It has been found by the lower Appellate Court that this land was the *raiyati jote* of two brothers, Jamal and Kamal, who were entitled to the same in equal moieties. Jamal purported to transfer his 8 annas share to the plaintiffs. Defendants 1 to 4 on Kamal's death succeeded to his eight annas, and they contest the plaintiff's claim to joint possession on the ground that the *raiyati jote* is not transferable. The lower Appellate Court, in reversal of the Court of first instance, has passed a decree in the plaintiff's favour for "possession in their

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(1) (1904) 5 C. L. J. 9.

(2) (1898) 2 C. W. N. CCLXXIX.

(3) (1902) 6 C. W. N. 624.

(4) (1906) 11 C. W. N. 76.

(5) (1908) 12 C. W. N. 1086.

(6) (1909) 13 C. W. N. 630.

(7) (1909) 14 C. W. N. 71.

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purchased eight annas share in the disputed land," holding that the defendants 1 to 4 had no right to plead the non-transferability of the holding.

From this decree the defendants 1 to 4 have appealed, and the only point is whether it is open to them to question the validity of the plaintiff's transfer.

It is common ground that the *jote* was not transferable without the landlord's consent, and that there is no finding that such consent was given; but it is argued that the absence of this consent is of no consequence, seeing that it is not the landlord who impugns the transfer. The question involved has been somewhat obscured in more recent times, and it will therefore be convenient to look into its history. As far back as Regulation VII of 1799, mention is made of a "tenant having a right of occupancy only so long as a certain rent. . . . be paid without any right of property or transferable possession;" (see section 15, clause 7,) while in Harington's Analysis, Volume III, page 450, it is said, "It is generally understood that the *raiyyats* by long occupancy acquire a right of possession in the soil and are not subject to be removed; but this right does not authorise them to sell or mortgage it, and it is so far distinct from a right of property.

In *Hyat Bebee v. Sheikh Akbar Alee* (1), a *raiyyat's* power of transfer came in question, and it was there said of the purchaser, "He bought as he thought something; the principle *caveat emptor* strictly applies, and it was for him to look to the certainty of getting a consideration for his purchase money. The party whom he succeeded had no equivalent to offer, he had merely a right of occupancy so long as he had paid his rents; failing to do so, either from inability or from unwillingness, the possession returned to the proprietor, the contract being no longer in force. Such is the custom of the country, and none but the tenures referred to in Act I of 1845, or in cases where a bonus has been given, thereby creating in the *raiyyat* a right of property to that extent, are considered tenures transferable by a *raiyyat*." In 1867 it was decided by a Full Bench that

(1) (1855) S. D. A. 20.

there was nothing in section 6 of Act X of 1859 which showed that it was the intention of the Legislature to alter the nature of a *jote* and to convert a non-transferable *jote* into a transferable one, merely because a *raiyyat* who held it for twelve years had thereby gained a right of occupancy. *Ajoodhya Pershad v. Imam Bandi Begum* (1).

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In 1874 it was decided by another Full Bench in *Nurendro Narain Roy v. Ishan Chunder Sen* (2) that an occupancy right was not transferable. Sir Richard Couch, in reference to section 6 of Act VIII (B. C.) of 1869, remarked: "The ordinary construction of the words appears to me to be that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property that could be transferred." Phear J. considered that the right was "rather of the nature of a personal privilege than a substantive proprietary right." Then there is the authoritative statement of the Privy Council in *Chandrabati Koeri v. Harrington* (3), that a right of occupancy cannot be transferred. This view has since been repeatedly recognized, e.g., *Bhiram Ali Shaik Shikdar v. Gopi Kanth Shaha* (4), *Durga Charan Mandal v. Kali Prasanna Sarkar* (5), *Sadagar Sircar v. Krishna Chandra Nath* (6); and its basis is that the right of occupancy is a right personal to the particular *raiyyat*. In this connection it is instructive to note the view expressed in *Tara Pershad Roy v. Soorjo Kant Acharjee Chowdhry* (7), that even if the zemindar consented to the transfer, the transferee would thereby merely acquire a new *jote* on the same terms as the original tenancy was held: cf. *Hyder Buksh v. Bhubendro Deb Koonwar* (8). It has, however, been held that a transferor cannot call in question the validity of his own transfer; but this is not because the transfer is valid, but because the doctrine of estoppel stands in his way: *Bhagirath Changa v. Sheikh Hafizuddin* (9).

(1) (1867) 7 W. R. 528.

(2) (1874) 22 W. R. 22.

(3) (1891) I. L. R. 18 Calc. 349.

(4) (1897) I. L. R. 24 Calc. 355.

(5) (1899) I. L. R. 26 Calc. 727.

(6) (1899) I. L. R. 26 Calc. 937.

(7) (1871) 15 W. R. 152.

(8) (1872) 17 W. R. 179.

(9) (1900) 4 C. W. N. 679.

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So far the position is intelligible, though I refrain from expressing any opinion as to the doctrine of estoppel, as it can have no application in this case. But it has been argued that it is only the landlord that can question the validity of what purports to be a non-transferable holding. For this, reliance has been placed on the statement in *Basarat Mandal v. Sabulla Mandal* (1), that the question of transferability was one that might be raised by the landlord, but could not be legitimately raised by trespassers like the defendant in that case. The *ratio decidendi* does not appear from so much of the judgment as has been reported, but an examination of the record shows that the plaintiff in that case alleged dispossession. This implies that the plaintiff had been in possession, and his suit in fact was to recover possession. This explains the decision, and it thus becomes apparent that it was not the intention of the learned Judges to disregard the decision in *Bhiram Ali's case* (2) which was cited to them.

Ambica Nath Acharjee v. Aditya Nath Moitra (3) obviously turns on its own peculiar circumstances. The contest was as to which of two persons had the better claim to a sum of money representing the balance of the proceeds of the sale of a holding after the landlord's claim had been satisfied. Ordinarily this balance would be payable to the judgment-debtor, but as he had parted with his interest he made no claim, and in fact the only claimants were the plaintiff and defendant, each of whom claimed to be a transferee of the judgment-debtor's interest. In these circumstances, it was held that the question of transferability did not arise, and the balance was awarded to the prior transferee. Obviously this case can have no bearing on the question now before us. When the facts in *Ayenuddin Nasya v. Srish Chandra Banerji* (4) are examined, it will be seen that the decision turned on the doctrine of estoppel as applied to a transferor and those who claim under him.

Much has been made of *Samiruddin Munshi v. Benga Sheikh* (5). But in this case dispossession was alleged, and as the

(1) (1898) 2 C. W. N. 602xxix.

(3) (1902) 8 C. W. N. 624.

(2) (1897) I. L. R. 24 Calc. 355.

(4) (1906) 11 C. W. N. 76

(5) (1909) 13 C. W. N. 620.

learned Judges merely remanded the case for further findings by the lower Court, there was no actual decision of any point material to the determination of the present case. It is, moreover, clear that the learned Judges did not intend to go beyond the case of *Basarat Mandal v. Sabulla Mandal* (1), *Ambica Nath Acharjee v. Aditya Nath Moitra* (2) and *Ayenuddin Nasya v. Srish Chandra Banerji* (3), with each of which I have already dealt. *Haro Chandra Podder v. Umesh Chandra Bhattacharjee* (4) merely follows *Ayenuddin Nasya v. Srish Chandra Banerji* (3).

It is no answer to the decision in *Bhiram Ali's case* (5) to say that the sale there called in question was in execution of a decree, for if a sale by private contract would validly pass a right of occupancy, then a sale in execution of a decree would equally pass it and *vice versa* [*Dwarka Nath Misser v. Hurrish Chunder* (6)], the power of voluntary transfer being the measure of the power of involuntary alienation.

In this case there is no room for the application of the doctrine of estoppel, nor is there any prior possession on which the plaintiff can rely, so that the case falls within the general rule that a right of occupancy cannot be transferred.

The decree of the Subordinate Judge should therefore be reversed and that of the Munsiff restored with costs throughout.

Doss J. concurred.

Appeal allowed.

S. M.

(1) (1898) 2 C. W. N. CCLXXIX.

(2) (1902) 6 C. W. N. 624.

(3) (1906) 11 C. W. N. 76.

(4) (1909) 14 C. W. N. 71.

(5) (1897) I. L. R. 24 Calc. 355.

(6) (1879) I. L. R. 4 Calc. 925.

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APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

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April 25.

NILMANI GOUNTIA

v.

JOGENDRA GOUNTIA.*

Lambardar—Ejectment, suit for—Central Provinces Land Revenue Act (XVIII of 1881) ss. 112, 138.

A lambardar is only a representative of the proprietary body of a mehal in its relations with Government, and is not entitled alone to bring a suit for ejectment.

SECOND APPEAL by the plaintiff, Nilmani Gountia.

This appeal arose out of a suit brought by the plaintiff for the recovery of *khas* possession of a *raiya* holding on the ground that the defendant was a trespasser. The allegation of the plaintiff was that the disputed holding was mortgaged to the defendant by the original tenants, who having failed to redeem the mortgage, the defendant foreclosed the holding and got symbolical possession thereof; that the consent of the plaintiff, who was the *lambardar gountia* of the village, not having been taken to the mortgage, it was invalid, and as such the defendant was a trespasser, and that therefore was liable to ejectment from the said holding.

Defendant, *inter alia*, contended that a suit for ejectment by a fractional co-sharer was not maintainable, and that there having been no abandonment of the holding by the original tenants, the plaintiff was not entitled to bring the suit.

The Court of first instance held that the plaintiff was entitled to remain in joint possession of the holding with the defendant to the extent of the plaintiff's share, and partly decreed the suit. Both parties appealed against that decision, and the lower Appellate Court dismissed the appeal preferred

*Appeal from Appellate Decree No. 2838 of 1907, against the decree of Purna Chandra Mitra, Subordinate Judge of Sambalpur, dated Sept. 21, 1907, reversing the decree of S. K. Ghose, Munsif of Sambalpur, dated April 23, 1907.

by the plaintiff, but having held that the plaintiff being a fractional co-sharer was not entitled to bring a suit for ejectment, decreed the appeal of the defendant.

Against this decision the plaintiff appealed to the High Court.

Babu Satis Chandra Ghose (with him *Babu Anilendra Nath Roy Chowdhry*), for the appellant. The Court below was wrong in holding that the suit for ejectment by the *lambardar* was not maintainable. The *lambardar* in the Central Provinces is an agent of the landlord *gountias* for the purpose of bringing a suit for ejectment. It has been held, in the case of *Ram Ruttan Ram Gopal v. Hira Laxman* (1), that the consent of the *lambardar* is necessary to the validity of a transfer of property; if he withholds his consent, he is entitled to sue to eject a trespasser. The case of *Gopal Ram Krishna v. Govind Pandurang Ramgari* (2) supports that view. The plaintiff's suit should not entirely have been dismissed, he being also a co-sharer of the village is entitled at least to get a decree for joint-possession to the extent of his share.

Babu Sarat Chandra Roy Chowdhry, for the respondent, was not called upon.

BRETT AND SHARFUDDIN JJ., In support of this appeal, it has first been argued that the lower Appellate Court is wrong in holding that the *lambardar* is not alone entitled to bring a suit to eject the defendant. It has been argued that as the *lambardar* is the agent for the purpose of representing the body of proprietors in their dealings with the Government, and as, for that purpose, he has to collect the rents, therefore he must be held to be, as an agent on behalf of the other co-sharers, entitled to bring a suit for ejectment. Reliance has also been placed on a judgment of the Judicial Commissioner of the Central Provinces in the case of *Ram Ruttan Ram Gopal v. Hira Laxman* (1) to support the view that the *lambardar* must be looked upon as the landlord whose consent under section 61,

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(1) (1891) 5 C. P. L. Rep. 47.

(2) (1900) 13 C. P. L. Rep. 113.

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clause (2) of the Central Provinces-Tenancy Act of 1898 is necessary to the validity of a transfer of property, and that, as he can by his consent make a transfer valid, so, if he withholds his consent, he is entitled under the law to sue to eject a transferee. In our opinion these contentions cannot be sustained. No doubt a *lambardar* represents the body of co-sharers in their dealings with Government for certain purposes, but the duties of a *lambardar* are explained in section 138 of the Central Provinces Land Revenue Act. That section does not give to the *lambardar* power to eject trespassers from lands or to eject tenants. Section 11 of the same Act defines a *lambardar* as "a person appointed in the manner prescribed by the Act to represent the proprietary body of a mehal in its relations with Government." The institution of a suit for ejectment against a purchaser is not one of the duties which the *lambardar* can be held to have to perform as representing the co-sharers in their relations with Government. The learned Subordinate Judge has held that the plaintiff *lambardar* cannot succeed in the present suit, because he, being only one of several co-sharer landlords, cannot alone sue to eject the defendant as a trespasser. This view has been accepted by the Judicial Commissioner of the Central Provinces in the case of *Gopal Ram Krishna v. Govind Pandurang Rangari* (1). It is true that in that case the persons who brought the suit were co-sharers in a village, and they were not joined by the *lambardar* as a plaintiff, and the learned Judge, in holding that those persons were not empowered under the law to bring the suit, accepted the principle which obtains under the Bengal Tenancy Act and other Tenancy Acts that, where an act has to be done by a landlord, and there are several landlords of the village, the act can only be done by all those several landlords acting in concert, and cannot be done by one or two of their number. This is the view which the lower Appellate Court has adopted in dealing with the present case. In our opinion it is correct. It has, however, been argued that even if the *lambardar* could not sue to eject the defendant

from the entire holding, still he was entitled to a decree for joint possession with the defendant. We think that that argument is not sound. In the first place, the suit was instituted by the plaintiff against the defendant as a trespasser, and he certainly could not be granted a decree for joint possession with a trespasser; and, secondly, as in the present case, the other co-sharers are not parties to the suit, and as the question cannot be considered and determined whether they are consenting parties to the transfer, it would be manifestly undesirable and impossible that a decree should be granted to the plaintiff for joint possession with the defendant as tenant. We think that the view taken by the lower Appellate Court is correct, and that it has rightly interpreted the provisions of the law as laid down in the Central Provinces Tenancy Act. We, therefore, confirm the judgment and decree of the lower Appellate Court and dismiss the appeal with costs.

S. C. G.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

MAHADEB AON

v.

CHAIRMAN OF THE HOWRAH MUNICIPALITY.*

Assessment, exemption from—Bengal Municipal Act (Ben. III of 1884) ss. 6, cl. 3, 85—Arable land—"Holding"—Bengal Municipal (Amendment) Act of 1894, s. 36.

The word "holding" in the Bengal Municipal Act, 1884, is wide enough to cover arable land which is, therefore, liable to be assessed under the provisions of the Act.

SECOND APPEAL by the plaintiff, Mahadeb Aon.

The plaintiff brought a suit for a declaration that a parcel of land, measuring one higha more or less, used for *betel*

* Appeal from Appellate Decree, No. 2328 of 1907, against the decree of Sri-pati Chatterjee, Subordinate Judge of Hooghly, dated June 17, 1907, affirming the decree of Debendra Nath Banerjee, Munsif of Howrah, dated Nov. 7, 1906.

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cultivation, was exempted from municipal assessment, as not coming within the provisions of section 85 of the Bengal Municipal Act, 1884 (Ben. Act III of 1884), for an injunction restraining the Municipal Commissioners of the Howrah Municipality from levying taxes assessed on such land, and for refund of the amount of the taxes and costs already realised from him.

The Court of first instance and the Appellate Court below dismissed the plaintiff's suit, and hence this second appeal.

Dr. Rashbehary Ghose and Babu Harendra Narain Mitter,
 for the appellant.

Babu Mahendra Nath Roy and Babu Krishna Prasad Sarbadhikary, for the respondent.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF, JJ. The question raised by this second appeal is one of considerable importance, namely, whether arable lands are liable to be rated under the Bengal Municipal Act, 1884.

The original suit was brought for a declaration that certain land within the limits of the Howrah Municipality, of which the plaintiff was in possession as a cultivator for the purpose of growing *betel*, was exempt from assessment under section 85 of the Act, for an injunction restraining the Municipal Commissioners of Howrah, through their Chairman, the defendant, from levying upon it the tax imposed on "holdings" thereunder, and for the recovery, after refund, of the amount actually realised from the plaintiff in respect of the said tax and costs. The Court of first instance and the lower Appellate Court have concurred in dismissing the suit, and the plaintiff has now appealed to this Court.

That section 85 of the Act provides, in clear and unambiguous language, for the imposition of a tax upon all "holdings," or, in the alternative, of a tax upon all persons occupying "holdings," in a municipal area, cannot, of course, be gainsaid; and the question before us thus resolves itself into one as to

whether or not a parcel of arable land, occupied as such, is a "holding" within the purview of the enactment.

By section 6, clause (3), of the Act the expression "holding" is defined as "meaning land held under one title or agreement and surrounded by one set of boundaries," while "land" is made, by clause (5) of the same section, to include things attached to the earth; so that it is equally indisputable that the word "holding" is, in itself, wide enough to cover arable land.

Section 98 exempts from assessment holdings used exclusively as places of public worship or as public burial or burning grounds, and, since it was amended by section 36 of the Bengal Municipal (Amendment) Act, 1894, it further provides for the special exemption of any holding used for purposes of public charity; while section 87, likewise since 1894, similarly relieves persons from assessment only in respect of their occupation of places used for public worship, burial or cremation. Obviously, neither of these express exemptions can be appealed to in this case.

But the contention put forward on behalf of the appellant by Dr. Rashbehary Ghose, and supported by arguments which the learned vakil has frankly adopted from two opinions given in 1884 and in 1890 by the then Advocate-General, Sir Charles Paul, is that, if the enactment be read, as it ought doubtless to be read, as a whole, it becomes manifest that the Legislature contemplated municipal taxation only in respect of some sort of habitation and residence, and that, therefore, purely agricultural holdings are outside the scope of the Act. Section 8, it is pointed out, makes a town or a village the nucleus of a municipality, and indicates that the intention was to deal with only inhabited and residential areas; and section 9 advances the contention by providing that not less than three-fourths of the population of an area included within the limits of an already constituted municipality shall be "chiefly employed in pursuits other than agriculture." Section 103 is then referred to, and this provision, it is urged, requires the rating-list to contain particulars as to the name of the street or road in which each holding is situated, whereas arable lands

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can seldom, if ever, be so described. Section 110 provides for remission or refund in respect of any holding which has been vacant for sixty or more consecutive days, and it is next contended that the word "vacant" is hardly applicable to culturable plots of land. And, finally, it is argued that the benefits to be derived from taxation under the Act—such as lighting, sanitation and water-supply—are, on the face of them, meant for persons occupying houses, and can be of no value to cultivators, as such.

Now, in order to justify a Court in overriding the plain language of a statute by reference to its spirit and general tenor, the argument must be cogent and convincing; but here we are by no means impressed by the reasoning of the learned *vakil* for the appellant. As regards sections 8 and 9 of the Act, suffice it to say that the proviso to the latter, which is most relied upon, does not exclude agriculturists altogether. As for section 103, the provision is purely ancillary and incidental, and it would, in our opinion, be absurd to allow the bare allusion in it to streets or roads to have any effect upon the general scope of the enactment. Moreover, there is nothing to prevent a parcel of arable land from lying alongside (and, so to speak, in) a road, and, even if it were not actually so situated, there would, so far as we can see, be nothing incongruous in describing it in a municipal register as being "in the road" to which access from it is available. And, indeed, we have it in this case from the judgment of the first Court that "everything was done in conformity with the provisions of section 103;" whence it follows that the appellant's land has been, and presumably must be capable of being properly, described in the manner indicated. Then, with respect to section 110, we are not prepared to concede that it is inapplicable, but should rather hesitate to hold that the benefit of the provision could not be claimed if a piece of arable land assessed with the tax in a municipality were to lie uncultivated, tenantless and unproductive of rent for the statutory period. And a reference to section 69, which declares the purposes to which a municipal fund, whether derived from taxation or

otherwise available, may be applied, is, we think, enough to refute the argument that—to take the case of the appellant before us—a person growing *betel* within a municipal area obtains, and can obtain, no benefit from the conveniences and advantages provided therein at the expense of the ratepayers.

On the other hand, the legislation of 1894 indicates unmistakably that the exclusion of agricultural lands, originally secured by express enactment in the case of assessment on persons occupying holdings, was intended to cease; and there remain certain provisions in the Act, as it now stands, which show that, in the case of taxation upon holdings also, exemption in respect of arable lands was not contemplated. Before the law was altered, and as it was when the late Advocate General advised on the point, the section—see section 79 of the old Bengal Municipal Act of 1866 and section 87 of the existing Act as it was passed in 1884—expressly enacted that the rate on the value of holdings should not be assessed or levied on any person in respect of the occupation of *arable lands* or of buildings used for public worship or as public burial or burning grounds, but the words italicised were repealed by the amending Act of 1894 already cited, and this deliberate omission obviously cannot be ignored. Next, section 96 requires all holdings to be valued, and sections 87 (*g*) and 103 (*h*) clearly indicate that the valuation-lists should include every holding and every person occupying a holding, whether exempt from taxation or not. Then exemptions, which do not in terms cover arable lands or the persons occupying such lands, are provided for by sections 87 and 98, and section 106 contains a special provision for relief in cases of excessive hardship. Further, section 86, clause (*d*), relates to the imposition of a water-rate on all “holdings” according as “the houses and lands” concerned are situated in streets supplied with water or in streets not so supplied, and clause (*b*) of the first proviso to section 279 directs that no such water-rate shall be levied upon “any land used exclusively for purposes of agriculture.” Clause (*e*) of section 86 likewise renders leviable a lighting-rate on the annual value of holdings generally, but the complementary section 308

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contains no exempting proviso similar to that to be found in section 279. No doubt, to the presence or absence of such a proviso little weight should be attached; for, as was observed by Lord Macnaghten in *Commissioners for Special Purposes of Income-Tax v. Pemsel* (1), and by Lord Chancellor Herschell in *West Derby Union v. Metropolitan Life Assurance Society* (2), it is well known that a proviso is not infrequently inserted in an Act merely to allay fears, although such fears are absolutely unfounded and no proviso is really necessary to protect the persons at whose instance it is added. This, however, hardly strikes us as a case of that class; and, as was also remarked by Lord Herschell in *West Derby Union v. Metropolitan Life Assurance Society* (2), a proviso may be used as a guide in the selection of one or other of two possible constructions of the words to be found in an enactment, where there is doubt as to its scope or as to the proper view to be taken of it. Here the exemption contained in the proviso to section 279 and the absence of any such exempting clause in section 308, taken with the amending legislation of 1894 and the other provisions of the Act above referred to, are most significant and seem to us to render it clear that no such exemption as that claimed by the appellant is contemplated.

The result, therefore, is that the appeal fails, and it must be dismissed with costs.

Appeal dismissed.

S. A. A. A.

(1) [1891] A. C. 531 539.,

(2) [1897] A. C. 647, 655.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

RUSI MENDLI

v.

SUNDAR MENDLI.*

1910
April 28.

Hindu Law—Partition—Reunion—Whether, after separation in estate, a minor member continuing to live jointly with an adult member, becomes a reunited member of the family—Survivorship.

When after partition in distinct shares amongst Hindu brothers, some of whom were minors, the minor brothers continued to live jointly with one of the adult brothers, that fact alone did not constitute a reunion with him after partition. In order to constitute a reunion, there must be a junction of estate with an intention to reunite.

SECOND APPEAL by the defendant, Rusi Mendli.

This appeal arose out of a suit brought by the plaintiff, who was a minor, for recovery of possession of certain lands owned by Ruttan and Badan, the deceased brothers of the late father of the plaintiff. The allegation of the plaintiff was that there was a partition between the plaintiff's father, his uncles, and the defendants; that after partition the plaintiff's uncles, Ruttan and Badan, who were minors at the time, continued to live jointly with their elder brother, the plaintiff's father; that there being a reunion, the plaintiff was entitled to recover possession of the said lands from defendants, who were step-brothers of his uncles.

Defence was that about twelve years ago there was a partition by arbitration amongst the defendants, the plaintiff's father and uncles, that each brother got a distinct share, that although Ruttan and Badan, after partition, continued to live jointly with their eldest brother, there was no reunion in law, and that the plaintiff was not entitled to get the property in preference to the defendants, inasmuch as they were a degree nearer than the plaintiff in relationship to the deceased Ruttan and Badan.

* Appeal from Appellate Decree, No. 1587 of 1908, against the decree of Purna Chunder Mittra, Subordinate Judge of Sambalpur, dated May 21, 1908, reversing the decree of S. K. Ghose, Munsif of Sambalpur, dated Feb. 25, 1908.

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The Court of first instance having found that there was a partition amongst the brothers, each brother having got a distinct share of the property, and that although Ruttan and Badan continued to live jointly after partition with the plaintiff's father, they, as also the plaintiff's father, dealt with the property separately by mortgaging them to third parties, came to the conclusion that there was no reunion in law between the plaintiff's father and his uncles, and dismissed the suit. On appeal, the learned Subordinate Judge reversed the decision of the first Court.

Against this decision defendant, Rusi Mendli, appealed to the High Court.

Babu Satis Chandra Ghose, for the appellant. Upon the facts found, the learned Subordinate Judge is wrong in holding that there was a reunion amongst the brothers. The mere fact that after partition the minor brothers, Ruttan and Badan, continued to live jointly with their eldest brother was not enough in law to constitute a reunion: *Kuta Bully Viraya v. Kuta Chandappa Vuthamulu* (1) and *Gopal Chunder Daghoria v. Kenaram Daghoria* (2). In order to constitute a reunion there must be a junction of estate. After partition the brothers dealt with their properties separately by mortgaging them to third parties; this clearly shows that there was no junction of estate. The arbitration award clearly showed that after partition each brother took a distinct share of the property. The Privy Council, in the case of *Balabux v. Rukhmabai* (3), held that the agreement to reunite could not be made on behalf of a person during his minority. That being so, Ruttan and Badan could not reunite as they were minors. Intention to reunite must be proved like other facts.

Babu Jyoti Prasad Sarbadhikary for *Babu Pramatha Nath Sen* (with him *Mr. G. Sircar*), for the respondents. The lower Appellate Court having found that there was a reunion, no question of law arose in the case. The finding was that there

(1) (1864) 2 Mad. H. C. 235.

(2) (1867) 7 W. R. 35.

(3) (1903) I. L. R. 30 Calc. 725.

was a partition amongst the six brothers, the three uterine brothers taking one share, and the three step-brothers taking the other share. The facts found by the learned Subordinate Judge were sufficient in law to constitute a reunion. The effect of the partition was not to cause a separation in the joint family of the uterine brothers: *Upendra Narain Myti v. Gopee Nath Bera* (1).

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BRETT AND SHARFUDDIN, JJ. The present appeal arises out of a suit brought by the plaintiff to recover possession of certain lands to which he claimed title by survivorship. It appears that the family to which the plaintiff belongs originally consisted of three uterine brothers and three step-brothers. The uterine brothers were Khedu, father of the plaintiff, Ruttan, and Badan, and the three step-brothers were Rusi, Firinghi and Busla. There was a partition of the family property about twelve or fourteen years ago between these six brothers, and, according to the statement made in the judgment of the Court of first instance, the property was divided into six different shares, the area and boundaries of each share being set out in the award of partition. After this partition, the uncles of the plaintiff, namely Ruttan and Badan, who at the time of the partition are said to have been mere boys, continued to live with their brother Khedu. After some time Khedu died, and the plaintiff, his son, continued to live with his uncles Ruttan and Badan. During this time, these persons messed together, and the profits of their property were collected jointly. Afterwards, Ruttan and Badan died, and the plaintiff claims title to the lands in suit as the nearest relation of those two persons, on the ground that, after the separation of the family, there had been a reunion amongst the three uterine brothers, and that he is entitled to succeed by survivorship as a member of the joint family with Ruttan and Badan in preference to the step-brothers.

The Court of first instance found that the plaintiff had failed to establish that there had been any reunion of the

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family after the partition, and that, therefore, the suit must fail. On appeal, the lower Appellate Court has come to a different conclusion, and has given the plaintiff a decree.

The main question that we have to determine in this appeal is whether the conclusions of the lower Appellate Court are based on findings and inferences of law, which are correct. The learned Subordinate Judge has come to the conclusion that there was a reunion, apparently on two findings of fact. The first is that, after the partition, the three brothers, Khedu, Ruttan and Badan, continued to live together as was quite natural, Ruttan and Badan being then minors and not in a position to mess or to manage their property separately. On this finding that the two minors lived with their brother, and that their property was managed jointly, the learned Subordinate Judge comes to the conclusion that there was a reunion of the members of this branch of the family. He also states as a fact—though it is suggested by the learned pleader for the respondent that it is a finding of fact—that the separation was only into two shares, each share being allotted to each set of brothers. This statement, from the description of the partition award given in the judgment of the Court of first instance, appears to us to be incorrect. If it is a finding, it is not supported, so far as we can ascertain, by any substantial ground. As a statement of fact, it appears to be contrary to what was the real state of affairs. On this statement, we think no argument whatever can be based, and it is for us to determine whether the conclusion which the learned Judge has drawn from the facts which he finds is a correct conclusion in law. The finding is that, after the partition, the two minor brothers continued to live with their elder brother, as was only natural, and the elder brother managed the properties of all three. From these facts he concludes that there was a reunion of the family. In our opinion, this conclusion is not sound in law.

In the case of *Kuta Bully Viraya v. Kuta Chandappa Vuthamulu* (1), it has been held that the mere circumstance that after partition the father and the minor son continued

(1) (1864) 2 Mad. H. C. 235.

to live together, and their shares as ascertained at the partition became mixed, does not conclusively constitute a state of reunion between the father and the minor, but is an evidentiary matter only to prove the reunion. In this case, therefore, the fact that the two minor brothers continued to live with their elder brother is not in itself sufficient to prove reunion. In the case of *Gopal Chunder Daghoria v. Kenaram Daghoria* (1), it was held that, according to the Hindu law, mere living together at one residence, or carrying on a joint trade, does not constitute a reunion after partition, but there must be a junction of estate. In the present case, the evidence referred to in the judgments of the lower Courts, especially in the judgment of the Court of first instance, so far from proving a junction of estate, goes to indicate that after the partition the share, at least, of Khedu, the father of the present plaintiff, was mortgaged as his separate property. In the case of *Balabux v. Rukhmabai* (2), the Privy Council has expressed the opinion that an agreement to reunite cannot be made on behalf of a person during his minority; so that, in the present instance, the mere fact that the two minor brothers lived with their elder brother would not, in itself, be sufficient to indicate an intention or agreement to reunite. In this case, as in the others, their Lordships held that the mere fact of living together is not sufficient to constitute a reunion, but that any agreement to remain united, or to reunite, must be proved like any other fact. In the present case, the learned Subordinate Judge has, in our opinion, concluded from facts, which in themselves are not sufficient to constitute reunion, that there was an intention to reunite. The Privy Council, in the case of *Rajah Setrucherla Ramabhadra v. Rajah Setrucherla Virabhadra Suryanarayana* (3), goes so far as to say that after a partition, when three Hindu brothers agreed that their separate shares should be kept joint, and that the eldest should manage the same, the true effect of the agreement was not to leave the family as a joint family, but to render the eldest brother accountable for receipts and expenditures on the footing of

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(1) (1867) 7 W. R. 35.

(2) (1903) I. L. R. 30 Calc. 725.

(3) (1899) I. L. R. 22 Mad. 470; L. R. 26 I. A. 167.

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ordinary agency and not of joint family management. In that case the agreement was made between the three brothers, with reference to their shares, to the exclusion of the separated share of the fourth brother. These authorities, in our opinion, leave no doubt that the facts on which the learned Subordinate Judge has arrived at his conclusion are not sufficient to support that conclusion as a valid conclusion in law.

It has, however, been contended on behalf of the respondents that what was in fact done at the time of the partition was that the two branches of the family separated, and that this separation of the three step-brothers from the three uterine brothers had not the effect of causing a separation in the joint family of the uterine brothers, and in support of this contention, the decision of this Court in the case of *Upendra Narain Myti v. Gopee Nath Bera* (1), is relied on. This contention, no doubt, would have had weight if the circumstances of the present case in any way supported it ; but from the description given of the separation in the judgment of the Court of first instance (which is not modified in any way by anything stated in the judgment of the lower Appellate Court), it is clear that the partition was, in fact, a partition of the properties between the six brothers, and was not a partition into two shares, leaving the uterine brothers as members of an united family. The learned pleader for the respondent, relying on the decision of the Privy Council in the case of *Balabux v. Rukhmabai* (2), has argued that, in this case, the plaintiff was entitled to prove that his father and his two uterine brothers remained united after the partition, and that the findings of the lower Appellate Court on that point are sufficient to conclude that question. We are unable to agree that the findings are sufficient, and we hold that, on the description of the partition as given in the judgment of the Court of first instance, which is not contradicted in the judgment of the lower Appellate Court, it is clear that there was a complete partition and separation of the property between the six brothers, and that, in order to support the plaintiff's claim, it was necessary for him to prove a legal

(1) (1883) I. L. R. 9 Calc. 817.

(2) (1903) I. L. R. 30 Calc. 725.

reunion of the family. The circumstances which the learned Judge has held to be sufficient to prove such a reunion, we have already held to be insufficient for that purpose. In these circumstances, we are unable to support the judgment and decree of the Court of Appeal below. We think that the view taken by the Court of first instance is correct. We, therefore, decree the appeal, set aside the judgment and decree of the lower Appellate Court, and restore those of the Court of first instance with costs.

Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice Woodroffe and Mr. Justice Richardson.

RAM LAL SUKUL

v.

BHELA GAZI.*

1910
April 29.

Landlord and Tenant—Occupancy right, extinguishment of—New occupancy right in the same holding—Acquisition of adverse rights in two capacities—Non-occupancy raiyat, if he can sub-let and create incumbrance—Incumbrance—Bengal Tenancy Act (VIII of 1885) ss. 22 cl. (2), 159, 160 cl. (g).

When an occupancy right is extinguished by the operation of section 22, cl. (2) of the Bengal Tenancy Act, a new occupancy right cannot be acquired in the same tenancy by the co-sharer proprietor by whose action the occupancy right has ceased to exist.

The owner of a holding cannot acquire a right adversely to himself in his other character as co-proprietor.

A non-occupancy *raiyyat* is a *raiyyat*, and the land held by him is a 'holding'; section 159 of the Bengal Tenancy Act applies to non-occupancy holdings also.

A non-occupancy *raiyyat* is not prohibited from sub-letting and may have an under-*raiyyat* under him, and may create a protected interest under section 160, cl. (g), if his landlord allows him so to do. An incumbrance may be created by a non-occupancy *raiyyat* on his holding, in limitation of his own interest, however limited, by way of sub-lease.

*Appeal from Appellate Decree, No. 1215 of 1908, against the decree of Srish Chandra Mukherji, Subordinate Judge of Tipperah, dated March 30, 1908, reversing the decree of Krishna Kumar Sen, Munsif of Comilla, dated March 27, 1907.

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SECOND APPEAL by the plaintiffs.

Certain persons, who were called Dichits, were co-sharer *maliks* of a certain *taluk*, within which one Golak Singh had a *jote* with rights of occupancy. In execution of a decree against Golak Singh the said *jote* was purchased in execution-sale by the said Dichits, who settled the land after their purchase with the principal defendants. In the Record-of-Rights prepared in 1898, the Dichits were recorded as settled *raiyyats*, and the principal defendants as *under-raiyyats*, in respect of Golak Singh's *jote*. The *taluk* was under the common managership for several years, and the common manager, on behalf of all the *maliks*, brought a suit for recovery of arrears of rent due for the said *jote* against the Dichits, and in execution of the decree obtained in that suit put the *jote* to sale. The *jote* was purchased by the plaintiffs in the sale. Within one year from their purchase, the plaintiffs served a notice under section 167 of the Bengal Tenancy Act upon the principal defendants for setting aside the incumbrance, *viz.*, the *under-raiyyati* interest in the *jote*. The defendants refused to vacate, and the present suit was instituted for ejectment.

The Munsif held that there was no evidence that, at the time of the purchase of Golak Singh's *jote*, the Dichits had any *maliki* interest in the *taluk*, and that, therefore, there was no merger of the occupancy right in the proprietary right. The suit was accordingly decreed by the Munsif. On appeal, the Subordinate Judge held that the Dichits were proprietors of the *taluk* at the time of their purchase of Golak Singh's *jote*, and that the occupancy right in respect of the said *jote*, therefore, ceased under section 22, sub-section (2) of the Bengal Tenancy Act, and that in consequence the Dichits must be held to have acquired a *raiyyati* holding divested of the occupancy right. He further held that section 163, sub-section (2), clause (b), or section 166 of the Bengal Tenancy Act which related to occupancy holdings, had no application, and hence section 167 of the Bengal Tenancy Act could not also apply. In conclusion, he held that the *jotes* of the principal defendants must be regarded only as *under-raiyyati*

interests and could be determined only by notice under section 49 of the Bengal Tenancy Act. The Subordinate Judge, therefore, declared the plaintiff's right to receive rent, but dismissed their claim for *khas* possession. Against this decree the plaintiffs preferred the present appeal.

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Dr. Sarat Chandra Basak, for the appellants. Section 159 of the Bengal Tenancy Act gives the purchaser the right to annul incumbrances. It applies to all kinds of holdings, whether occupancy or non-occupancy. The word 'holding' is defined in section 3, clause (9). In the Act, where the Legislature intended to refer to occupancy holdings only, it is said so in express terms: see section 163, sub-section (2), clause (b) and section 166. Section 159, proviso (b), refers generally to the procedure to be adopted in annulling the incumbrance, and this makes section 167 applicable to the present case. Sections 163 and 166 cannot control the general section 159, which gives right to annul. If the view of the lower Appellate Court be correct, a mortgage which is an incumbrance could never be set aside by a purchaser in the position of the plaintiffs. Assuming that section 22 applies to the case, section 22, clause (2) would no doubt extinguish the occupancy right that was subsisting at the date of the sale of Golak Singh's *jote*, and the Dichits must be held to have purchased a non-occupancy holding. But there is nothing to prevent fresh acquisition of occupancy rights under sections 20 and 21 of the Bengal Tenancy Act. A perpetual non-occupancy right is opposed to the Bengal Tenancy Act. Then, again, one co-sharer may hold as a *raiyyat* against other co-sharers: *Jawadul Huq v. Ram Das Saha* (1), affirmed by the Full Bench in *Ram Mohan Pal v. Sheikh Kachu* (2). After their purchase, the Dichits were recognised by all the landlords as occupancy raiyats, and there is nothing in the Act to prevent such recognition. The Record-of-Rights cannot also be lightly discarded: *Kali Roy v. Pratap Narain* (3). Lastly, the doctrine of merger is not applicable

(1) (1896) I. L. R. 24 Calc. 143

(2) (1905) I. L. R. 32 Calc. 386.

(3) (1906) 5 C. L. J. 92.

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to lands in the mofussil. It was unknown to the country before the passing of the Bengal Tenancy Act: *Womesh Chunder Goopto v. Raj Narain Roy* (1), *Jibanti Nath Khan v. Gokool Chunder Chowdry* (2), *Lal Mahomed Sarkar v. Jagir Sheikh* (3). In the present case, purchase by the Dichits were made long before the passing of the Bengal Tenancy Act, hence section 22 cannot apply.

Babu Akshay Kumar Banerji, for the respondents. Section 49 of the Bengal Tenancy Act shows how an *under-raiyat* can be ejected. "Holding" in section 159 must mean holding at a fixed rate, or occupancy holding. If non-occupancy holdings were intended to be included in section 159, the procedure similar to sections 163 and 166 would have been given. A co-sharer who purchases an occupancy holding under section 22, clause (2), cannot acquire occupancy right under section 20, which is, in this respect, controlled by section 22. There is no authority for the contention of the appellant. As to the contention with regard to the date of the purchase by the Dichits, there is no finding that the purchase was made prior to the passing of the Bengal Tenancy Act, and the point was not taken in either of the Courts below. The doctrine of merger was not unknown to the country before the passing of the Bengal Tenancy Act. *Womesh Chunder Goopto v. Raj Narain Roy* (1) and *Lal Mahomed Sarkar v. Jagir Sheikh* (3) do not decide the point.

Dr. Sarat Chandra Basak, in reply.

Cur. adv. vult.

WOODROFFE J. It has been firstly argued that the Court of appeal should have held that the tenancy was an occupancy *raiyati* holding, and that the tenancy having been in existence and purchased by the Dichits prior to the passing of the Bengal Tenancy Act in 1885, section 22, clause (2) of that Act did not apply, with the result that there was no merger of the occupancy right. This question, though raised by the grounds of

(1) (1868) 10 W. R. 15.

(2) (1891) I. L. R. 19 Calc. 760.

(3) (1909) 13 C. W. N. 913; 918.

appeal before us, was not raised in the lower Court and cannot be now gone into. There is nothing in the paper book on this point which is sought to be established by reference to a passage in the evidence. But, then, it is said that assuming section 22 does not apply, and that under section 22, clause (2), the occupancy right then existing was extinguished by the transfer of the right of Golak Singh to the Dichits, the lower Appellate Court should have held that by reason of Dichits subsequently continuously holding the land as *raiyats* for a period of twelve years and more from the date of their purchase they acquired a new occupancy right. It is contended that the occupancy right, which is extinguished by the section, is only the right which existed at the date of the transfer, and that there is nothing to prevent the acquisition of a new occupancy right. To hold this would, I think, defeat the policy of the section. And, further, the owner of the holding could not acquire a right adversely to himself in his other character as co-proprietor. The lower Appellate Court, therefore, correctly held that the properties purchased by the plaintiffs in execution of the decree for arrears of rent are a *raiyati* holding without occupancy right. The question then arises whether the plaintiffs under section 159 have power to annul under-tenancies as incumbrances. It has been contended that they cannot, that the provisions of Chapter XIV do not apply to purchasers of non-occupancy holdings, and that the only remedy open to a purchaser of such a holding is under section 49 by ejectment. I think, however, this is not so. A non-occupancy *raiyat* is a *raiyat*, and the land held by him is a 'holding.' Chapter XIV is general in its terms and refers to "sale for arrears under decree." Section 159 speaks of a holding, and where the Act intends to refer to occupancy holdings, it so qualifies the terms. The latter section provides that a sale of a holding for arrears will pass the holding subject to protected interests and with power to annul incumbrances. Then, is that which it is sought to annul an incumbrance? I think that (on the case made by the defendants here) it is. It may be observed that a non-occupancy *raiyat* is not prohibited from sub-letting and may

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have an *under-raiyat* under him and may create a protected interest under section 160, clause (g), if his landlord allows him so to do. An incumbrance may be created by a non-occupancy *raiyat* on his holding in limitation of his own interest, however limited, by way of sub-lease. I am of opinion, therefore, that there was an incumbrance which plaintiffs had power to annul, and the appeal must therefore be allowed with costs and the decree of the first Court restored.

RICHARDSON J. I agree.

Appeal allowed.

S. M.

ORIGINAL CIVIL.

Before Mr. Justice Pugh.

1910
May 2.

RAMADHIN BANIA

v.

SEWBALAK SINGH.*

High Court, Original Side, jurisdiction of—Revisional jurisdiction over Presidency Small Cause Court—Civil Procedure Code (Act V of 1908) s. 115—“Appeal”—Practice—Sanction to prosecute—Code of Criminal Procedure (Act V of 1898) ss. 195, 195 (6), 439.

A Judge of the Presidency Small Cause Court, Calcutta, had summarily refused an application for sanction to prosecute the plaintiff for making a false claim in a suit before him. On an application to the High Court under section 115 of the Code of Civil Procedure, to set aside this order and to compel the Judge to determine the application :—

Held, that the jurisdiction of the High Court in all such revisional applications, whether in respect of suits or other matters, is vested in a single Judge sitting on the Original Side.

Samsner Mundul v. Ganendra Narain Mitter (1), *Sarat Chandra Singh v. Brojo Lal Mukerjee* (2) followed. *Haladhar Maiti v. Choytonna Maiti* (3) referred to.

A civil Court, when acting under section 195 of the Criminal Procedure Code, is not in any way exercising criminal jurisdiction, and is subject to the revisional jurisdiction of the High Court under section 115 of the Code of Civil Procedure.

*Application in Original Civil Suit No. 7½ of 1910.

(1) (1902) I. L. R. 29 Calc. 498-

(2) (1903) I. L. R. 30 Calc. 986.

(3) (1903) I. L. R. 30 Calc. 588.

Salig Ram v. Ramji Lal (1), *In the matter of the petition of Bhup Kunwar* (2), *Ram Prosad Roy v. Sooba Roy* (3), *Guru Churn Saha v. Girija Sundari Dasi* (4), *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (5), *Eranholi Athan v. King-Emperor* (6), referred to.

An application under section 195, sub-section 6 of the Criminal Procedure Code is not an appeal, hence the revisional jurisdiction under section 115 of the Civil Procedure Code is not excluded.

Hardeo Singh v. Hanuman Dat Narain (7) distinguished.

APPLICATION.

This was an application by Sewbalak Singh, the defendant in a suit instituted in the Court of Small Causes, Calcutta, for an order that the order passed by the 5th Judge, refusing sanction to prosecute the plaintiff, Ramadhin Bania, might be set aside, and that the Judge might be directed to hear and determine the application for sanction according to law.

It appears that on the 27th September 1909, Ramadhin instituted a suit against Sewbalak Singh in the Court of Small Causes, Calcutta, for the recovery of Rs. 34 alleged to be due for money lent in Calcutta on the 11th July 1909. It was alleged by the petitioner that on the 27th January 1910, the plaintiff desired to withdraw his suit, but the Judge refused to allow the withdrawal. The suit proceeded: the plaintiff was examined, but called no further evidence. The defendant denied all liability and alleged that the claim was entirely false and dishonest. The suit was dismissed with costs.

On the 10th February 1910, an application was made to the 5th Judge by a pleader on behalf of the defendant, but instructed by the Criminal Investigation Department, for the issue of a notice upon the plaintiff to show cause why sanction should not be given to prosecute the plaintiff for fraudulently and dishonestly, and with intent to injure the defendant, making a claim which he knew to be false in a Court of Justice. The Judge refused the application on two grounds: *first*, that if such an application was entertained, there would be numerous similar applications every day; and, *secondly*, that it did

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(1) (1906) I. L. R. 28 All. 554.

(4) (1902) 7 C. W. N. 112.

(2) (1903) I. L. R. 26 All. 249.

(5) (1903) 8 C. W. N. 73.

(3) (1897) 1 C. W. N. 400

(6) (1902) I. L. R. 26 Mad. 98.

(7) (1903) I. L. R. 26 All. 244, 247.

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not appear from the records that the suit was false or fraudulent, and that he was not bound to go beyond the records or take evidence to establish fraudulent intent.

The present application was, thereupon, made to a single Judge, sitting on the Original Side of the High Court, for the purpose of setting aside the above order. A rule was obtained in the first instance, and it came on for hearing, on the 2nd May 1910, before PUGH J.

Mr. Stokes and Mr. R. C. Bonnerjee, for the petitioner. The main points are : *first*, is this application properly made under section 115 of the Code of Civil Procedure ? *Secondly*, should the application be made to a single Judge sitting on the Original Side, or to a Divisional Bench of the High Court ? On the first point, it is established that the application is of a civil nature and could not be made before the Criminal Bench : *Mahomed Bhakku v. Queen-Empress* (1), *Shama Charan Das v. Kasi Naik* (2), *Guru Churn Saha v. Girija Sundari Dasi* (3); Roy's Sanction to Prosecute, pages 127-128. The term "case" in section 115 has a larger signification than "suit" and would cover applications of this nature. This is a proper matter over which the Court may exercise its revisional jurisdiction. The 5th Judge of the Small Cause Court summarily refused to hear the application for sanction to prosecute, and so failed to exercise the jurisdiction vested in him. On the second point, it is submitted that this application is properly made before a single Judge sitting on the Original Side and not before the Presidency Bench : *Shamsher Mundul v. Ganendra Narain Mitter* (4), *Sarat Chandra Singh v. Brojo Lal Mukerjee* (5). *Haladhar Maiti v. Choytonna Maiti* (6) is distinguishable : the jurisdiction of a single Judge, sitting on the Original Side, was not denied ; but only for the sake of convenience, Maclean C.J., by virtue of the power conferred on the Chief Justice under section 14 of the Charter, specially constituted a Bench to deal with the application.

(1) (1896) I. L. R. 23 Calc. 532.

(2) (1896) I. L. R. 23 Calc. 971.

(3) (1902) 7 C. W. N. 112.

(4) (1902) I. L. R. 29 Calc. 498.

(5) (1903) I. L. R. 30 Calc. 986.

(6) (1903) I. L. R. 30 Calc. 588.

The opposite party appeared in person and stated that the suit in the Small Cause Court was not false, and that it failed as his witnesses were absent.

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PUGH J. This is an application under section 115 of the Civil Procedure Code for an order that what is described as a judgment, but is really an order of the 5th Judge (now officiating 4th Judge) of the Calcutta Small Cause Court, refusing sanction to prosecute the plaintiff in a certain case, may be set aside; that the record should be sent for, and such order as the Court may think fit and proper may be passed.

The order actually asked for is that the 5th Judge, now the officiating 4th Judge, may be directed to hear and determine the application according to law. It is made by Sewbalak Singh, the defendant in the Small Cause Court suit, who is represented by Mr. Hume as his attorney, who is in fact the Public Prosecutor, and it is stated that this application is made by him officially, and not as a merely private attorney. It appears from the affidavit of Surjya Pada Banerjee, a pleader, that he made the application on behalf of Sewbalak, but instructed by the Criminal Investigation Department, and it was refused on two grounds—*first*, that if such an application was entertained, there would be numerous similar applications every day; and, *secondly*, that the Court was not bound to go beyond its record, which, I take it, means there is nothing on the record to show that the case was false.

In my opinion, neither of these grounds are valid grounds, and I come to the conclusion that the Judge has declined to exercise a jurisdiction vested in him, in that he has refused to hear and determine the application, for rejecting an application on these grounds is not a judicial decision of the matter before him.

Certain points, however, arise, (i) whether the application is properly made to me, and (ii) whether the application is a case within section 115, if it is not, I certainly cannot deal with it; (iii) whether the application to me is of a civil or criminal nature; (iv) whether there is in fact an appeal, or a procedure

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so similar to an appeal, as to provide an effective remedy, and whether, in consequence, an application in revision is excluded.

A rule has been issued in the first instance, which has been served on the plaintiff in the Small Cause Court suit, and he has appeared in person and of course cannot assist me on the legal questions. All he says is that in fact the case was not false, and that he only withdrew it because his witnesses were absent.

As to the first point, the application is novel and of first impression so far as this Court is applied to in respect of the giving or withholding of sanction by the Small Cause Court; but there have been a number of cases under the old section 622 in which the question as to the proper Bench for applications in respect of cases proper, or suits in the Small Cause Court, was considered, and which afford some assistance on this point.

There has been a well-established practice for at least 50 years that these applications should be made on the Original Side of this Court, and it was considered settled that these applications should be made on the Original Side by counsel.

For some short time prior to 1902, similar applications were successfully made on the Appellate Side by vakils. This was, however, put an end to by a decision of Rampini and Pratt JJ. in *Shamsher Mundul v. Ganendra Narain Mitter* (1), who held that the Bench taking the Presidency Group had no jurisdiction in Calcutta, and therefore no jurisdiction over the Calcutta Small Cause Court. This question turned on the order of the Chief Justice allocating business to the various Benches, and while this order gave the Presidency Group jurisdiction over cases from the 24-Parganas—the 24-Parganas is not Calcutta. However, another application was made by a vakil in the case of *Haladhar Maiti v. Choytonna Maiti* (2) to the then Chief Justice, Sir Francis Maclean, and Mr. Justice Mitra. A preliminary objection was taken based on the last case, but it was overruled on the ground that the learned Judges were not dealing with the matter as the Judges taking

(1) (1902) I. L. R. 29 Calc. 498.

(2) (1903) I. L. R. 30 Calc. 588.

the Presidency Group, but as a Bench constituted by the Chief Justice to deal with the case, and there could be no question but that the Chief Justice had the power to constitute such a Bench and deal with the application. With regard to the practice he says : ' applications have invariably been made to the Chief Justice, who can appoint, and who does then and there appoint, himself and the Judge who may be sitting with him to be the Bench to hear the application.'

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There is a different statement as to the practice in the case of *Sarat Chandra Singh v. Brojo Lal Mukerjee* (1) made by Mr. Justice Sale as follows :—

" It is a remarkable fact that the jurisdiction of a Judge, sitting on the Original Side to exercise revisional powers over the Presidency Small Cause Court, which is now challenged for the first time, has been exercised ever since the establishment of the High Court, over 40 years ago, as its records abundantly show. Within this period innumerable applications have been heard and determined by single Judges sitting on the Original Side of this Court."

This decision was called for in consequence of a claim by a vakil to make such an application on the Original Side, for the exclusive jurisdiction of the Original Side, had been in the meantime, and between the decision of these two cases, settled by a rule made by the High Court on the Appellate Side on the 12th June 1903. Rule IV A. is as follows :—Applications under section 622 of the Code of Civil Procedure for revision of orders of the Calcutta Presidency Small Cause Court shall be heard by a single Judge sitting on the Original Side of the High Court.*

Having regard to the fact that the statement in the later case was made by Mr. Justice Sale shortly after the rule in question was passed, when, no doubt, the whole position had been fully considered by all the Judges, there can be little doubt that the later statement as to the practice with regard to these applications is the more authoritative, and there can also be little doubt that the practice was incorrectly presented to the

(1) (1903) I. L. R. 30 Calc. 986.

* See Rule V of the High Court Rules, App. Side, Ed. 1910, p. 9

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Chief Justice : but the matter is now merely academical because of the rule in question.

In practice, since then the Chief Justice has never constituted a Bench to hear such applications, and they are no longer made to him.

It follows from this, and the decision in *Shamsher Mundui v. Ganendra Nath Mitter* (1), that no other Bench has jurisdiction to hear the ordinary application in revision from the Small Cause Court.

This rule is in the widest terms and it seems to me by process of elimination of any other Bench to vest in a single Judge on the Original Side the jurisdiction in all such revisional applications.

It remains, however, to consider whether the application for sanction is a "case" under section 115, and whether it is of a criminal nature so as to oust the jurisdiction that I would otherwise have, and whether the applicant has another and more proper remedy. The first two of these points are covered by a Full Bench decision of the Allahabad High Court, *Salig Ram v. Ramji Lal* (2), following another Full Bench decision, *In the matter of the petition of Bhup Kunwar* (3). The point is shortly dealt with by Sir John Stanley C.J. and Sir W. Burkitt J., but very fully and completely by Sir George Knox J., in which he reviews the whole legislation on the subject and holds that the High Court on the Criminal Side has no jurisdiction under section 439 of the Criminal Procedure Code to interfere with an order of a Civil Court passed under section 195, but that the High Court has such power under section 622 of the Code of Civil Procedure, and that a Civil Court, when acting under section 195, is not in any way exercising criminal jurisdiction. The reasoning in this judgment seems to me conclusive, and I follow it. It is not, therefore, necessary for me to discuss the matter further beyond mentioning that it appears that *Ram Prosad Roy v. Sooba Roy* (4) was a case where a sanction granted by a Civil Court was revoked under the Civil Revisional Juris-

(1) (1902) I. L. R. 29 Cals. 498.

(3) (1903) I. L. R. 26 All. 249.

(2) (1906) I. L. R. 28 All. 554.

(4) (1897) 1 C. W. N. 400.

dition, and that in *Guru Churn Saha v. Girija Sundari Dasi* (1), an application of this kind was dealt with on the Civil Side of the High Court, while in *Kali Prosad Chatterjee v. Bhuvan Mohini Dasi* (2) following *Eranholi Athan v. King-Emperor* (3), it was held that the Criminal Revision Bench had no power to interfere with an order of a Civil Court under section 476 of the Criminal Procedure Code, though there have been some earlier cases collected in *In the matter of the petition of Bhup Kunwar* (4), at which a different conclusion was arrived at. However much difference there may have been as to whether a Criminal Bench had the power or not, I do not find any reported decision in which the power under section 622 to interfere has been questioned, except a reference in Sanjiva Row's Notes on the Code of Civil Procedure to a case (5) in the Punjab Chief Court which I am unable to discuss as I have not access to the report, but which does not commend itself to me and is contrary to the Allahabad Full Bench case to which I have referred and with which I agree. I notice also that Mr. S. Roy, in his work on Sanction to Prosecute, pages 127-128, mentions two unreported cases, in which it was held that the Criminal Bench have no jurisdiction. There only remains to consider whether my jurisdiction to interfere is excluded by reason of there being an appeal. In *Hardeo Singh v. Hanuman Dat Narain* (6), Sir John Stanley says: "Sub-section 6 of section 195 gives a right of appeal in very clear terms. Whether it is called an appeal or a right to make a substantive application to have an order refusing or giving sanction set aside, appears to us to be immaterial."

It was immaterial for the purpose Sir John Stanley was then considering, viz., the powers of the District Magistrate, but for this purpose it is material, and in my opinion the application under sub-section 6 of section 195 is not an appeal properly so-called, and therefore the power of revision is not excluded. It may be that eventually, when the application has been heard and decided, it will be open to the parties to make

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(2) (1903) 8 C. W. N. 73.

(5) 6 O. C. 216.

(3) (1902) I. L. R. 26 Mad. 98.

(6) (1903) I. L. R. 26 All. 244, 247.

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an application under section 195, sub-section 6 to the High Court, but the matter has not advanced to the stage when any question whether such an application should be made has arisen.

With regard to the point that the Small Cause Court is not bound to go beyond its records, I would only observe that the records have nothing to do with the application. The plaint is before the Court, and the Court will have to ascertain whether the case made on the plaint was a true or false case, and if a false case, whether sanction should be granted or not. It may be that to decide whether the case is a false case will involve an enquiry equivalent to trying the case *de novo* : if the Judge finds that necessary, he must discharge the duty the law imposes on him.

I do not wish in any way to interfere with the discretion of the learned Judge when he hears the application when he will apply the principles which are well known and appear in the reported cases, but I only observe, if the number of false cases brought in his Court is, as he seems to consider, excessive, which view is confirmed by the fact that the public authorities have thought fit to take steps in reference to it, this is a reason for granting, not for refusing the application : for how is his Court to be purged of such cases if the Judge himself is an obstructionist to any efforts in that direction. ?

I, therefore, direct that the record be returned to the Small Cause Court with a direction to the 5th Judge, now officiating 4th Judge, to hear and determine the application.

Application allowed.

J. C.

Attorney for the petitioner : J. T. Hume (Public Prosecutor).

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April 14, 15,
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[On appeal from the High Court at Fort William in Bengal.]

Landlord and Tenant—Permanent tenure of an agricultural character—Underground rights not mentioned in lease—Minerals under surface of land—Rights of zemindar—Onus of proof—Transfer of Property Act (IV of 1882) ss. 108, 117.

The question for decision in this case was, whether certain Goswamis, the sebaits of an Idol and lessees of a village in the zemindari of the appellant, the Rajah of Pachete, had under their lease, which had been granted by a predecessor in title of the appellant about 60 years ago, acquired any rights to the minerals beneath the surface of the village which they could have transmitted to the respondents who claimed to hold under them. There was no document or evidence defining the terms of the lease to the Goswamis. Two decrees in favour of the Rajah for the payment of an annual rent of Rs. 22-15-6 by the Goswamis were put in, in one of which they were described as "cultivators," and in the other as "britti-holders." There was no evidence whatever that the Rajah had ever granted mineral rights in the village to the Goswamis or to any other person. Both the Courts in India found that the village was a *mal* (rent-paying) village of the zemindari of the Rajah, and that no prescriptive right had been proved by the respondents to any underground rights in the village. The High Court held that the zemindar had created a permanent tenure of an agricultural character, and that the tenure-holder would possess all underground rights in the absence of express reservation by the zemindar.

Held, by the Judicial Committee (reversing that decision), that the title of the zemindar Rajah to the village being established, he must be presumed to be the owner of the underground rights appertaining thereto in the absence of evidence that he had parted with them, and no such evidence had been produced.

Field's Bengal Regulations, Introduction, page 36, referred to.

In the case of leases under the existing law of 1882 (the Transfer of Property Act, IV of 1882, s. 108), no right arises for a lessee to work mines not open when the lease was granted.

APPEAL from a judgment and decree (28th July 1905) of the High Court at Calcutta which reversed a judgment and

*Present : LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON, and MR. AMEER ALI.

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decree (16th July 1903) of the Court of the Additional Subordinate Judge of Burdwan.

The son and representative of the first plaintiff, and the successor as manager of the second plaintiff, were the appellants to His Majesty in Council.

The principal question for decision on this appeal was whether the respondents had acquired any right or title to the underground minerals beneath the village Petena, a *mal* (rent-paying) village situate within the ancestral zemindari of the Rajah of Pachete. The original plaintiffs were Kumar Hari Narayan Singh Deo Bahadur, and Mr. A. T. Ricketts, manager of the Pachete Estate under the Encumbered Estates Act (Bengal Act VI of 1876). By order of the Court of 22nd April 1903, Kumar Jyoti Pershad Singh Deo Bahadur, son of the first plaintiff (deceased), and Mr. E. B. Clair Smith, successor to the second plaintiff in the management of the estate, were respectively substituted for them on the record.

The facts of the case fully appear from the report of the appeal to the High Court (PRATT and PARGITER JJ.), which will be found in I. L. R. 33 Calc. 54.

On this appeal,

Sir R. Finlay, K. C., DeGruyther, K. C., and J. M. Parikh, for the appellants, contended that in view of the fact that both the lower Courts had found (a) that the village of Petena was a *mal* village of the appellant's zemindari leased to the Goswamis, (b) that the village was not Moguli debattar of the Goswamis, and (c) that the respondents had not proved any title by prescription to the underground rights in the said village, the onus was on the respondents to show that their alleged lessors, the Goswamis, had ever acquired any underground rights in the village. That onus they had not discharged. The land and all the rights on it, or under it, belonged to the zemindar as the owner of a permanent, hereditary, and transferable tenure, and the only rights considered at the time the lease was granted were agricultural rights, which would not carry the right to minerals or any other underground rights

unless they had been specially granted. Such rights were not then thought of, and it was unnecessary for the zemindar to specially reserve them. It was for the tenant to prove any right he alleged to be his. The zemindar in this case never granted mineral rights in the village to the Goswamis, nor to any other person; and there was no documentary evidence of any kind to show that he ever did so. As he was the owner of the right to minerals, he must, in the absence of evidence to the contrary, be presumed to have reserved that right. The lease was not a permanent one, as had been wrongly held by the High Court, but one liable to forfeiture if the land were used in a manner not justified by the terms and conditions of an agricultural lease; and if, as contended, the Transfer of Property Act (IV of 1882) did not apply, the case should be decided by "equity and good conscience, generally interpreted to mean the rules of English law, if found applicable to Indian society and circumstances." The High Court having wrongly held the lease to be a permanent one, decided that the grant of a permanent tenure included mines where not expressly reserved. A lease without mention of mines might include any mines which were then open (and there were no such mines in question here), but not unopened mines. Reference was made to *Clegg v. Rowland* (1), *Elias v. Snowdon Slate Quarries Company* (2), *Waghela Rajsanji v. Masludin* (3), *Kally Dass Ahiri v. Monmohini Dassee* (4), *Abhiram Goswami v. Shyama Charan Nandi* (5), Bengal Regulation I of 1793; *Wise v. Bhoobun Moyee Debia Chowdhranee* (6), *Secretary of State for India v. Luchmeswar Singh* (7). The landlord can insist on the land being used for the purpose for which it was granted: Transfer of Property Act (IV of 1882) sections 8, 108, clause (o) and section 117; Tagore Law Lectures for 1895; "The Land Law of Bengal" by Sarada Charan Mitra,

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| (1) (1866) L. R. 2 Eq. 160, 164. | (4) (1897) I. L. R. 24 Calc. 440, 446. |
| (2) (1879) L. R. 4 A. C. 454. | (5) (1909) I. L. R. 36, Calc. 1003; |
| (3) (1887) I. L. R. 11 Bom. 551, 561; | L. R. 36 I. A. 148. |
| L. R. 14 I. A. 89, 96. | (6) (1865) 10 Moo. I. A. 165, 171 |
| (7) (1888) I. L. R. 16 Calc. 223, 231 | |

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pages 393, 394; Bengal Tenancy Act (VIII of 1885), sections 2, 4-6, 10, 11-16, 18-20, 75-77, and 179; *Lal Sahoo v. Deo Narain Singh* (1) (a case under Bengal Act VIII of 1869, the old Bengal Rent Act); and the cases of *Tituram Mukerji v. Cohen* (2) and *Megh Lal Pandey v. Rajkumar Thakur* (3) were distinguished on the ground that in the former mineral rights were specially granted, and in the latter "all rights" were leased. Field's Bengal Regulations, Introduction, page 36, and *Najar Chandra Pal Chowdhuri v. Ram Lal Pal* (4) were also referred to. It was submitted that the respondents had failed to prove that the village in suit was debottar property held in the name of the Idol Gopi Nath Jiu as alleged; and that the Goswamis were tenants of the appellant only in respect of the surface of the land of the village, and as such did not acquire any underground rights in it.

Ross, for the respondents, contended that the High Court had rightly held that the tenure of the Goswamis was a permanent one created by a predecessor in title of the appellant many years ago, and that its annual rental of Rs. 22-15-6 was fixed in perpetuity; that the underground rights in the village of Petena passed with the said tenure when it was created, and were in no way reserved to the zemindar; and that the underground rights appertained not to the appellant's zemindari, but to the permanent tenure of the Goswamis. He pointed out that there had been quarrying by the respondents without any objection for a considerable number of years; and relied mainly on the following portion of the judgment of PARGITER J. in support of his contentions:—

"The question then must be decided solely upon a consideration of the nature of such permanent tenures as (are) settled by the land-law of this country. Now when such tenures are created, the zemindar invests the tenure-holder with every right that can appertain to him short of the quit-rent due to the proprietorship; the tenure is permanent, herit-

(1) (1879) I. L. R. 3 Calc. 781.

(3) (1906) I. L. R. 34 Calc. 358.

(2) (1905) I. L. R. 33 Calc. 203;

(4) (1894) I. L. R. 22 Calc. 742, 750.

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able and transferable, its rental is as fixed as the Government revenue that the zemindar pays ; and the tenant can do what he likes with it, short of altogether destroying it ; in short, it has all the rights of proprietorship except the name ; and the zemindar (in the absence of express conditions) has really divested himself of everything except the nominal proprietorship, and has turned his rights practically into a perpetual annuity of the amount of the rental. He has no right of reversion. In such a state of their respective rights there is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines, because they do not belong to his tenure ; and that the landlord can never work them, because he has no reversion and no right to enter on the land for that purpose. In the absence of any express warrant for such a view, I cannot assent to such an unreasonable proposition. In my opinion the underground rights belong to permanent tenures. When the landlord created the tenure, he made over the land with all its capabilities to the tenant, and merely imposed on the tenure the rental that he thought best in the circumstances. When neither of them knew of undiscovered materials of value within the land, and the idea of reserving anything never entered their minds, it certainly cannot be held that there was any such reservation in the grant, nor that a distinction can be afterwards drawn between various rights that may exist in the land for the purpose of qualifying the original grant and of importing into it what neither party could then imagine.

“The fact that the land was agricultural when the tenure was created, and that the tenure is classed as an agricultural one, does not derogate from the rights conveyed in the tenure, because no restriction was put on the use of the land, and the tenure-holder's use of it is not limited to agriculture ; he can build on it and apply it to other non-agricultural purposes. There is no distinction in law, or in common usage in this country, between the surface of land and the underlying strata, except when it has been created of recent years, either

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by the law as in the Land Acquisition (Mines) Act XVIII of 1885, or by contract. When a man obtains permanent possession of land with heritable and transferable rights, then, in the absence of any reservation, he obtains it with all rights attaching to it from the centre of the earth to the sky. If a permanent tenure-holder can use the surface which is agricultural land for non-agricultural purposes, there is no reason why his right in the subjacent strata should be less or different. It is impossible to import into contracts stipulations that the law did not attach to them that are not naturally inherent in them, and that the parties themselves had no conception of at the time of contracting. I am decidedly of opinion, therefore, that where a tenure is permanent, the tenure-holder possesses all the underground rights, unless there is something express to the contrary."

Reference was made to the Transfer of Property Act, section 2, it being contended that that Act was not applicable to the present case.

DeGruyther, K.C., replied, referring to *Hari Mohan Misser v. Surendra Narayan Singh* (1).

May 7.

The judgment of their Lordships was delivered by

LORD COLLINS. The appellants are the Rajah of the Pachete Estate and the Manager thereof under Act VI of 1876.

The question in the case is as to the right to the minerals lying under a certain village called Petena, situate within the ancestral zemindari of the first appellant. The case has been left singularly bare of evidence, and must be decided chiefly by giving effect to the proper presumptions arising out of a small number of ascertained facts. Happily the field of controversy has been narrowed by certain concurrent findings of fact. Both Courts are agreed that about 60 years ago, in the time of the first plaintiff's predecessor, a transaction took place whereby the latter appropriated to a certain Hindu Idol known as Thakur Gopi Nath Jiu, of whom certain persons known in those proceedings as the Goswamis, or Gossains, were the

shebais or priests, an interest of some sort in the village of Petena, at an annual rental of Rs. 22-15-6. There is no document or evidence defining the terms of the arrangement with the Idol set up at the trial. The defendants, however, against whom the plaintiff's first took proceedings to restrain interference with their minerals, purported to justify their trespasses under the authority of the Goswamis under whom they claimed to hold a lease. Two leases of the 6th and 7th Magh 1228 respectively (1821 A.D.), purporting to have been granted by the Goswamis to the said defendants, and also certain rent receipts said to have been exchanged, were produced on the part of the defendants at the trial, but they were held by both Courts to be palpable forgeries. Both Courts have held that the village Petena is a *mal* village of the Pachete Estate, *i.e.*, it is a part of the first plaintiff's zemindari. There is no evidence whatever that the zemindar Rajah has ever granted mineral rights in the said village to the Goswamis or any other person. Both Courts agree that no prescriptive rights have been proved by the respondents to any underground rights in the village. The language of the High Court is quite explicit :—

“ There is no evidence regarding the extent, publicity, or continuity of such operations to establish the mokuraridar's acquisition by prescription of the underground rights claimed.”

The Subordinate Judge finds that there is no evidence to show that the plaintiffs 1 and 2 were aware of the exercise of any underground rights before 1898, when steps were immediately taken to stop it. Two decrees in favour of the Rajah for the payment of an annual rent of Rs. 22-15-6 by the Goswamis were put in, in one of which they were described as “ cultivators,” in the other as “ britti-holders.”

On this meagre foundation of fact the two Judges who constituted the High Court have built up the theory that the Goswamis were tenure-holders having permanent heritable and transferable rights.

“ When such tenures are created,” says Pargiter J., “ the zemindar invests the tenure-holder with every right that can appertain to him short of the quit-rent due to the proprietorship ; the tenure is permanent, heritable, and transferable, its rental is as fixed as the Government revenue that the zemindar pays ; and the tenant can do what he likes with it short of altogether destroying

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it; in short, it has all the rights of proprietorship except the name....In such a state of their respective rights there is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines, because they do not belong to his tenure; and that the landlord can never work them because he has no reversion and no right to enter the land for that purpose.... In my opinion the underground rights belong to the permanent tenures."

No decided case was cited in support of the view of the High Court, which seems practically to ignore the distinction between the mere tenure-holder and the zemindar, and the law as laid down in the passage cited from Mitra's Land Law of Bengal does not appear to quite accord with the view of Mr. Field in his admirable Introduction to the Bengal Regulations, page 36, where he says :—"The zemindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his zemindari, and the rights of mining, fishing, and other incorporeal rights are included in his proprietorship." It would seem, therefore, that Mr. Field did not regard his letting the occupancy right as presumptive evidence of his having parted with his property in the minerals. In the case of leases under the existing law of 1882, no right arises for a lessee to work mines not open when the lease was granted. The learned Subordinate Judge inferred from the smallness of the *jamma* fixed that only the surface rights and nothing more were intended to be let out to the Gossains. On the whole, it seems to their Lordships that the title of the zemindar Rajah to the village Petena as part of his zemindary before the arrival of the Goswamis on the scene, being established as it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced. Their Lordships will humbly advise His Majesty that the decision of the High Court be set aside, and that of the Subordinate Judge restored with costs here and below.

J. V. W.

Appeal allowed.

Solicitor for the appellants : *Edward Dalgado.*

Solicitors for the respondents : *T. L. Wilson & Co.*

LETTERS PATENT APPEAL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Doss.*

KARNADHAR HALDAR

v.

HARIPRASAD ROY CHAUDHURI.*

1910
May 13.

Injunction—Perpetual Injunction restraining execution of a decree obtained in a previous suit against the plaintiff—Specific Relief Act (I of 1877) ss. 54, 56 (e).

Where the defendant has not invaded, or threatened to invade, the plaintiff's right to, or enjoyment of, any property, and there is no apprehension of a multiplicity of judicial proceedings to which the plaintiff need be subjected for the purpose of establishing or safeguarding his rights, or for preventing the acquisition of rights of the defendant :—

Held, that s. 56 of the Specific Relief Act constitutes a manifest bar in the way of the plaintiff's suit for a declaration that the defendant had no title to lands in suit, and for perpetual injunction restraining the defendant from taking possession of the lands by executing his decree.

Dhuronidhur Sen v. Agra Bank (1) followed in principle.

Appu v. Raman (2) not followed.

APPEAL by the defendant.

This appeal arose out of a suit brought by a landlord asking for an injunction restraining the defendant from taking possession of a holding in the landlord's estate in respect of which the defendant had obtained a decree for possession in a suit in which the landlord had not been a party. The defendant's father had long ago purchased a third portion of the holding, and thereafter had purchased the remaining 2/3rd portion at a sale in execution. In 1903 the defendant brought a suit against one Pi-yarimohan Banerjee, asking for possession, on the ground that Pi-yarimohan had dispossessed him from the holding. In this suit, to which the landlord was not a party, defendant obtained a decree on an appeal to a Subordinate

*Letters Patent Appeal, No. 143 of 1909, in appeal from Appellate Decree No. 422 of 1908.

(1) (1878) I. L. R. 4 Calc. 380.

(2) (1891) I. L. R. 14 Mad. 425.

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Judge, a decree which was affirmed by the High Court. The decree was for possession of the holding. The landlord in the present suit, which is on appeal, sued for an injunction restraining the defendant from taking possession under cover of the aforesaid decree. The Munsif held that, as the tenancy was not transferable, the defendant had no right under the purchase. He granted the injunction prayed for, restraining the defendant from taking possession. On appeal, the District Judge confirmed the Munsif's judgment. On second appeal to the High Court, Caspersz J., sitting singly, dismissed the appeal. The defendant, thereupon, filed this appeal under section 15 of the Letters Patent.

Babu Biswanath Bose, for the appellant. The plaintiffs cannot get an injunction because the defendant has not invaded, or threatened to invade, the right to the enjoyment of any property. The case does not come under section 54 (d) of the Specific Relief Act. Then, again, section 56 (b) is a bar to the suit. There is no fear of multiplicity of suits. The Calcutta case of *Dhuronidhur Sen v. Agra Bank* (1) is in my favour; see Mr. Justice Markby's remarks in the case. The defendant has, moreover, been recognised as a tenant by the landlord and now the suit is inequitable.

Babu Harendra Narayan Mitter, for the respondents. On the findings of fact arrived at by the Courts below, defendant is a trespasser and not a tenant. A multiplicity of suits is inevitable: see section 54 (d) and (e) of the Specific Relief Act and Woodroffe's "Law relating to Injunctions," pp. 359, 361. The landlord's right in his property does not merely consist of a right to receive fair and equitable rent for it, but a great deal more. He may enhance rent or take *khas* possession or derive other benefits in other ways. He can choose his own tenant and refuse to have undesirable tenants. The enforced recognition of transferability of a holding is undoubtedly an injury which cannot be repaired. The case, therefore, comes within the meaning of "irreparable injury."

(1) (1878) I. L. R. 4 Cal. 380.

The question of "pecuniary compensation" was not raised in the Courts below, and on general equities of the case the landlord should not be compelled to accept pecuniary compensation in return for parting with rights or some of the rights. Clause (e) of section 56 is in my favour. *Stalkartt v. Gopal Panday* (1) and *Appu v. Raman* (2) are clearly in my favour. Lastly, the mere receipt of rent from a *marfatdar* is not recognition of the tenancy : *Naba Kumari Debi v. Behari Lal Sen* (3).

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JENKINS C.J. This appeal raises a point of some interest, and notwithstanding the ingenious argument of Mr. Mitter, I hold that the appellant is entitled to succeed.

The case arises in this way: the present defendant brought a suit to recover possession of lands from which he said he had been wrongfully ousted. He obtained a decree in his favour for recovery of possession, and that decree was ultimately confirmed by the High Court. As yet the plaintiff in that suit, who is the defendant in this, has taken no steps to execute his decree, and it does not appear that he has even threatened to execute it. But the present plaintiffs have commenced this suit, whereby they pray to have it declared that the defendant had no title to the lands in suit, to establish that they are not bound by the decree of the Title Suit No. 135 of 1903, for perpetual injunction restraining the defendant from taking possession of the lands in suit by executing the decree of Title Suit No. 135 of 1903, and for damages.

The Munsif has granted the plaintiff's prayer for an injunction to the extent of restraining the defendant from taking *khas* possession of the lands in suit, as he is the plaintiff's tenant; and that decree has been confirmed by the lower Appellate Court and afterwards by Mr. Justice Caspersz on appeal to this Court, and it is from this judgment of Mr. Justice Caspersz that the present appeal is preferred to us under the Letters Patent.

(1) (1873) 20 W. R. 168.

(2) (1891) I. L. R. 14 Mad. 425.

(3) (1907) I. L. R. 34 Calc. 902.

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The case has been argued—and I think properly argued—upon the basis that the whole question turns upon whether this is a case in which the plaintiffs are entitled to the injunction which has been granted to them, for if they are not so entitled, then the declarations made in their favour would naturally go, as they were merely steps towards the relief of an injunction. In my opinion, the plaintiffs are not entitled to this injunction. The law is formulated for us in Chapter X of the Specific Relief Act : and, to begin with, it was incumbent upon the plaintiffs to bring themselves within the conditions prescribed in section 54 of that Act. Mr. Mitter conceded that his best chance of success was to rely on the provision of clause (e). But in my opinion clause (e), which prescribes as one of the conditions entitling the plaintiffs to an injunction, that such relief is necessary to prevent a multiplicity of judicial proceedings, has no application, for the simple reason that there was no ground to apprehend any such multiplicity. The clause has application to a well-known condition of affairs which is absolutely remote from that with which we have to deal in this case. It is not as though the plaintiffs here would have to bring repeated suits or to make repeated applications or to take repeated proceedings for the purpose of establishing or safeguarding their rights, or of preventing the acquisition of rights by the defendant. If they are right in their contention, then should the present defendant obtain possession, it will be open to these plaintiffs to bring such suit as they may think proper for the purpose of recovering possession. It is unnecessary to consider the rest of section 54, though I would point out that on the facts of this case it is impossible to say that the defendant has invaded, or threatened to invade, the plaintiffs' right to, or enjoyment of, any property. Further than that, section 56 appears to me also to constitute a manifest bar in the way of the plaintiffs' suit : I say so, notwithstanding the decision of the Madras High Court in *Appu v. Raman* (1). I feel as Mr. Justice Markby did when deciding *Dhuronidhur Sen v. Agra Bank* (2). He said at page 396 : "It

(1) (1891) I. L. R. 14 Mad. 425.

(2) (1878) I. L. R. 4 Cal. 380.

has already been found difficult enough to bring litigation in this country to a termination, and, if we were to grant this injunction, I am very much afraid that advantage would be taken of the precedent to prolong litigation very much further.

In my opinion, the plaintiffs have failed to establish any right to bring this suit for an injunction, and I think the judgment of Mr. Justice Caspersz was erroneous. We, therefore, reverse the decree of the lower appellate Court and dismiss the suit with costs throughout.

Doss J. I agree.

S. M.

Appeal allowed.

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ORIGINAL CRIMINAL.

Before Mr. Justice Woodroffe.

EMPEROR

v.

TARANATH ROY CHOWDHRY.*

1910
May 18.

Confession—Admissibility of statement alleging, whether truly or not, that it was not voluntary—Evidence Act (I of 1872) s. 24.

A statement in writing by the accused, which contains an allegation from which it is to be inferred that the statement of which it forms a part was not made voluntarily, is inadmissible.

THE accused was originally tried at the Ordinary Criminal Sessions of the High Court by Brett J., with a Special Jury, on the 5th May 1910, charged, under sections 19 (f) and 20 of the Arms Act (XI of 1878), with having in his possession or under his control arms and ammunition in contravention of section 14, and with keeping them secretly. The Jury disagreed, three being for conviction and six for acquittal. They were thereupon discharged, and the accused remanded pending a re-trial which was directed by the learned Judge. The case was re-tried, on the 17th May, before Woodroffe J. and a Special Jury on the same charges.

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The facts of the case, as alleged by the prosecution, were as follows. In September or October 1907, the accused was employed by Ganendra Nath Sircar, residing at No. 4 Raja's Lane, as a private tutor to his brother, Bhupendra Nath Sircar, and lived in his house till about March or April 1908, occupying the *baitakhana*. He then left and went to his brother's house, 67 Maniktolla Street, but continued to visit Ganendra occasionally. In the first week of May 1908, he took a tin box to Ganendra and asked him to keep it for a few days, alleging that it contained printing materials. The box was locked and the key was with the accused. The box was kept upstairs in Ganendra's room. The accused went there, on the 18th May, opened the box and took out two revolvers and some cartridges, and then left taking the key with him. Bhupendra witnessed the incident and mentioned it to his brother. The latter then consulted Shashi Bhushan Dey, a police officer of the Criminal Investigation Department, who advised him to inform Mr. Halliday, the Commissioner of Police, and accompanied him the next day to the office of the latter. On the 19th May Inspector Purna Chunder Lahiri of the same department searched the house at 4 Raja's Lane under a search warrant, and seized the box which, on being opened, was found to contain 1,200 cartridges, revolvers, daggers and instruments for making cartridges. Ganendra was arrested and kept in custody, and released the next day on bail. The accused then absconded, but was ultimately arrested at Benares on the 19th December 1909, and brought down to Calcutta on the 21st and lodged in the Presidency Jail.

He was then placed before Mr. D. Swinhoe, Offg. Chief Presidency Magistrate, who held an inquiry into the case preliminary to commitment. A number of witnesses for the prosecution were examined on the 31st January 1910; and thereafter, on the 14th March, the prisoner made a statement to the Magistrate which was taken down as follows:—

“The accused says:—I am not guilty, but will make a statement. I inform the Court virtuously that on the 16th May 1908, on Monday, when I returned home to 67 Maniktolla Street after visiting my uncle.”

Q. What is his name ?

A. Nundo Lal Roy, peshkar of the Chandpur Sub-Deputy's Court, when he was ill and under treatment in No. 3 College Square, I met one Pabitra Churn Dutt, the manager of the Chatro Bhandar student's school at 4 College Square. He requested me as a friend that a tin box containing types and other press materials was with him which he wished me to keep for him for a day or two on condition he would take it back after that time. After some discussion, though I first refused him, I consented to keep the box with me on condition as I said before. Afterwards I walked with him to his house. He took a coolie and brought down the box from upstairs, and he came with me as far as College Square, and then went off to his office. I met Ganendra Nath Sircar at 4 Raja's Lane and told him I wanted to keep the box in his house, and he inquired what the contents of the box were. I replied that there were press materials inside belonging to a friend of mine which will be taken back by him within a day or two. About 9 A.M., on the 16th, I made over the box to Ganendra in his house downstairs in the presence of another man whom I personally do not know. I know him by sight. Then I left Ganendra's and returned home. The key of the box was not with me, but with Pabitra. This is the box (*Exhibit I*). Then I was unemployed. I was so busy looking out for work that I forgot all about the box. On the 18th May 1908, at 7-30 P.M., Pabitra and another man met me at my house at 67 Maniktolla and asked me to return the box. I said the box was in a house near his house, I would point it out and return it. Pabitra, I and the other young man came near Raja's Lane. Pabitra gave me a key and asked me to go in and open the box and take away two revolvers. On hearing this I begged with folded hands and said "kindly take away your box." Then I said "golmal is going on in Calcutta. You are throwing me in such a condition when there is no friend of mine here." Then Pabitra said, "I have heard that my house will be searched, so I do not like to take away the box to-day. I shall take it the next day." Then I became angry and remonstrated with him. Then I took the key from Pabitra who instructed me and went to Ganendra's house upstairs, into Ganendra's mother's room, where the box was. I opened it and took out two revolvers covered with paper. At that time I did not see the contents of the box, and up to the present moment I do not know what it contains. I made over the two revolvers to Pabitra in his office room at 4 College Square. Then I returned home. I came to know in this Court what the contents were.

[The accused then related about his going to the Police Court on the 19th in connection with the case of Phanindra Nath Mitter, the editor of the "*Jugantar*," and about his arrest there, and continued:]

"On the 20th May I came to learn that Ganendra had made a statement against me. On the 21st I came to the Court to surrender, and inquired of Manoj Mohan Bose, pleader, if there was any warrant against me. He said he did not know, and when a warrant was issued I should surrender. In this way I was hiding myself in Calcutta. At that time I was informed that Pabitra Dutt, Kartick Dutt and Narendra Nath Bose and others held a meeting and

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decided that they would kill me, and Kartick stood forward to do so. On hearing this I ran away and left Calcutta."

[The accused then gave an account of his first stay at Benares, his flight from there under fear of assassination, and his ultimate return to the city, and continued :]

"In Chaitro 1315 I returned to Benares. I fell ill and was bedridden in the house of my sister, Harimati Dabi. On the 19th December 1909, Chandi Das Mukerjee arrested me in her house and brought me down to Calcutta. We reached here on the 21st when I was placed before the Court.

I was told by Purna Babu that my sister has been cited as a witness in this case and a subpoena has been sent against her to Benares. On hearing this, that a Hindu Brahmin *purdanashin* young lady would be dragged into Court, I became anxious and saw the Commissioner and Deputy Commissioner of Police, and Purna on that very day, fell at their feet and requested them not to drag my sister into Court. The Commissioner and the Deputy Commissioner told me that if I made a true statement they would request the Magistrate to show leniency and mercy on me. On Thursday last the Deputy Commissioner and Purna saw me in the Presidency jail, and there I fell at their feet and requested them not to cite my sister. They could rather kill me. I wrote out a statement addressed to the Commissioner of Police with a forwarding letter. On Friday, at noon, the Deputy Commissioner and Purna saw me in the jail and got that written statement signed, and said they would send a telegram to Benares stopping the service of a subpoena issued against my sister. They also saw me in the Central Lock-up. I fell at their feet and wanted to know whether my sister had been informed not to attend. They said my sister had not been informed as yet. After my statement was recorded she would be informed. I ask for mercy.

Q. Is the statement made by you voluntarily ?

A. I would not have made this statement had I not been pressed by Purna Babu that he would cite my sister as a witness and drag her into Court and expose her, and he also threatened me he would institute two other cases against me. He said, if I made my statement in this case he would not do so. I did no act of lawlessness or sedition. Only for six months I served as manager of the "*Jugantar*." I had no connection with the association of any conspirators or any society or club belonging to any conspiracy.

(Sd.) D. Swinhoe,—14-3-10.

Accused asks that this statement should not be shown to his counsel, or pleader for the prosecution, or to the press, as, if it gets out he has made such a statement he will be killed."

(Sd.) D. Swinhoe,—14-3-10.

(Sd.) Taranath Roy Chowdhry,—14-3-10.

On the 16th March the accused retracted the above statement altogether, and filed another statement before the Chief Presidency Magistrate, alleging that on the 21st December 1909 Purna Chunder Lahiri asked him to make a statement and

promised to save him, but he refused to do so ; that on the 12th January 1910 Lahiri again told him that if he made a statement they would consider whether another case against him under section 121 of the Indian Penal Code, would be proceeded with or not, but he again declined ; that on the 17th January Lahiri saw him in the Presidency Jail and tried to induce him to become an approver just like one Panna Lal Chatterjee who has been given Rs. 3,000, and that on his refusal Lahiri threatened him. The accused further stated that on the 9th March Lahiri informed him that his sister had been cited as a witness, and would be brought down and kept under police custody until the case was over ; that on the 10th he was taken to Lahiri, the Deputy Commissioner being then present, and Lahiri told him to write out his statement, and he did so on condition his sister was not cited as a witness ; that Lahiri dictated and he made notes from which his statement was subsequently written out ; that on the 11th he saw Lahiri and the Deputy Commissioner at No. 2 Corridor, and added some words to the statement at the request of the former, who also asked him to make the same statement before the Magistrate ; and that on the 14th Lahiri asked him to make the statement according to his instructions, and to request the Magistrate not to supply any one with a copy of it, and that the summons on his sister would then be cancelled. He concluded by saying that he never saw the tin box before he came to Court, and that he falsely identified it on the former occasion under Lahiri's direction.

Some other prosecution evidence was taken and the prisoner was subsequently committed to the High Court.

Purna Chandra Lahiri was examined at the trial and admitted that he saw the prisoner on the 21st December 1909, the 12th and 17th January 1910 alone, and on the 9th, 10th and 14th March with the Deputy Commissioner, but he denied that he ever promised or induced or threatened him, and stated that the Deputy Commissioner also never did so as far as he knew. He said that a subpoena was taken out against Hari-mati Debi on the 8th February 1910, but that neither he nor

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the Deputy Commissioner at any time held out hopes to the prisoner that she would not be called as a witness if he made a statement. In cross-examination he stated that on the 21st December he asked the prisoner to make a statement, and told him that if he did so it would "simplify" the case, which he explained as meaning that he desired to know "how far he was guilty in the whole conspiracy." He further said that he might have told the accused, on the 12th January, that there was a case under section 121 of the Indian Penal Code against him, but did not promise to refrain from proceeding with it. To the Court he said that the accused appeared to him to be under the impression that, if he made a statement, his sister would not be called as a witness.

Mr. Teggart, Deputy Commissioner of Police, who was also examined at the trial, denied that any inducement, threat, or promise had been made to the prisoner. He said that the prisoner had requested him, on the 9th and 14th March, not to cite his sister as a witness, but that he (witness) told him that he had no power in the matter.

The statement of the accused, taken by the Chief Presidency Magistrate on the 14th March, was tendered in evidence and objected to.

Mr. N. C. Sen, for the prisoner. The statement is inadmissible, as the Magistrate did not comply with the provisions of sections 164 and 364 of the Criminal Procedure Code. There is no certificate. Even if it is not a confession it is inadmissible. A statement by the accused, not amounting to a confession, can only be taken at the close of the evidence for the prosecution, not in the middle of it: see section 209. Sections 209 and 342 only enable the accused to explain circumstances in the evidence against him, and not to make incriminating statements. If the accused makes a confession during the inquiry, it can be recorded under section 164, otherwise the Magistrate should tell the accused to wait till the prosecution has closed and then to make the statement. If the accused pleads guilty in an inquiry preliminary to commitment, the Magistrate can-

not accept the plea till the end of the prosecution case : *Queen-Empress v. Bhairab Chunder Chuckerhutti* (1) at pages 713, 716, 717. The confession is not voluntary. It appears on the face of the document that it was made in consequence of inducement relating to the proceedings against him : see section 24 of the Evidence Act, *Empress v. Asghar Ali* (2) and *Queen-Empress v. Uzeer* (3). Section 287 of the Code refers to statements taken under sections 209 and 342, but this statement was not made under the latter sections. If it is inadmissible, it ought to be rejected now, and not put to the jury : *Reg v. Garner* (4).

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The Standing Counsel (Mr. Ali Imam), for the Crown, instructed by *Mr. Hume, Public Prosecutor.* The statement is admissible under section 287 of the Code. It is not taken under sections 209 and 342, but under section 255, and is admissible under section 287. The evidence of Mr. Teggart and Purna Chunder Lahiri shows that no inducement, threat or promise was made. The statement was made voluntarily.

WOODROFFE J. I am not satisfied that the provisions of the Criminal Procedure Code allow the statement made by the accused to be admissible. Apart from that, I am not clear that the statement can be taken to be a voluntary statement, for the same document contains an allegation (whether true or not need not now be considered) that the statement is not voluntary. I must, therefore, reject it upon the objection of the learned counsel for the defence.

E. H. M.

(1) (1893) 2 C. W. N. 702.

(2) (1879) I. L. R. 2 All. 260.

(3) (1884) I. L. R. 10 Calc. 775.

(4) (1848) 1 Den. C. C. 329.

LETTERS PATENT APPEAL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Doss.*

1910
May 26.

NABIN CHANDRA SHAHA

v.

KULA CHANDRA DHAR.*

Landlord and Tenant—Occupancy raiyats—Enhancement of rent—Proof of rise in price of staple food-crops, how ascertained and Court's duty in the matter—Prevailing rate for similar land in same or neighbouring villages with same advantages—Bengal Tenancy Act (VIII of 1835) ss. 29, 30, 32, 39.

In a suit for enhancement of rent under s. 30 of the Bengal Tenancy Act, it is the duty of the Court to refer to the price-lists prepared under s. 39, whether the parties to the suit produce these or not.

It is right and proper that the Civil Court, in directing a local investigation under s. 31 (b), should indicate to the officer holding the investigation what it is that the Court precisely requires.

Where the Court is satisfied that all the rent in the village should be excluded from consideration in finding out the prevailing rate in the village, because it is fixed in a mode which contravenes the provisions of s. 29 of the Bengal Tenancy Act, then an enquiry should be directed which will bring to light the prevailing rate of rent paid by occupancy *raiya*ts for lands of a similar description and with similar advantages in the neighbouring villages.

LETTERS PATENT APPEAL by the plaintiffs, Nabin Chandra Shaha and others.

The plaintiffs instituted suits for enhancement of rent of the defendants, who were occupancy *raiya*ts, on the ground of their holding at a rental below the prevailing rate and of the rise in the price of staple food-crops. It was alleged that the last previous enhancement in the case of most of the other occupancy *raiya*ts of the plaintiffs for lands of a similar description and with similar advantages in the same village or in neighbouring villages was from annas 13 odd to Re. 1-4 per bigha, and that these tenants had been paying at that rate for over twelve years. There were three separate local enquiries

*Letters Patent Appeal No. 134 of 1909, in Appeal from Appellate Decree No. 741, etc. of 1908.

by three revenue-officers, all of whom came to the conclusion that the prevailing rate was Re. 1-4. The Munsif held that the reports of the revenue-officers were insufficient, as it did not give the prevailing rate of the village in question, the number of tenants, and the rates paid by them. He further held that as the enhancements made by the plaintiffs contravened the provisions of section 29 of the Bengal Tenancy Act, they could not be taken into account in finding the prevailing rate, and he, therefore, refused to refer the matter again to the revenue officers. With reference to the rise in the price of staple food-crops, the Munsif held that the oral evidence was unsatisfactory and could not be relied upon. In the result, he dismissed the suits. On appeal, the Subordinate Judge affirmed the decision of the Munsif on the question of the prevailing rate. In connection with the rise in the price of staple food-crops, he held that the Munsif might have properly referred to the Government Gazette, but as it did not appear that any such gazette was produced by the plaintiffs, he upheld the decision of the Munsif and dismissed the appeal.

The second appeal to the High Court was heard by Caspersz J., sitting singly, and his Lordship affirmed the decisions of the Courts below. The plaintiffs, thereupon, preferred this appeal under section 15 of the Charter.

Dr. Sarat Chandra Basak, for the appellants. The Munsif adopted an erroneous procedure in deciding the question as to the rise in the price of the staple food-crops upon oral evidence. Under sections 32 and 39 of the Bengal Tenancy Act, the Court is bound to decide the question from price-lists published in the Government Gazettes. Section 39, clause (6) is imperative, and it is the duty of the Court to refer to the lists whether they are produced by the parties or not. The intention of the Legislature is to put an end to all controversies about average prices, and evidence is admissible only to show that any entry in the list is incorrect. Then, assuming that the enhancements made were bad under section 29, the Court should have rejected these rates from consideration, and found out the prevailing

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rate of lands in neighbouring villages with similar advantages and of the same description. Lastly, I contend that section 29 does not control section 31. Under the last section, Courts should have regard to the rates actually paid.

Babu Harendranarayan Mitra, for the respondent. Sections 32 and 39 of the Tenancy Act cannot override the provisions of the Evidence Act. It was the duty of the plaintiffs to make out their case. Section 31 could only refer to the rates lawfully paid : see definition of rent in section 3, clause (5).

JENKINS C.J. This is a suit brought for enhancement of rent under section 30 of the Bengal Tenancy Act. It was dismissed by the Munsif, and that decree of dismissal was confirmed by the lower Appellate Court. On appeal to this Court Mr. Justice Caspersz expressed his agreement with the lower Appellate Court. It is from this judgment of Mr. Justice Caspersz that the present appeal is preferred under section 15 of the Letters Patent.

The grounds on which the plaintiffs based their claim for enhancement were, *first*, that the rate of rent paid by the defendants was below the prevailing rate paid by occupancy *raiyats* for land of a similar description and with similar advantages in the same village or in neighbouring villages, and that there was no sufficient reason for their holding at so low a rate ; and, *secondly*, that there has been a rise in the average local prices of staple food-crops during the currency of the existing rent. Both these grounds, in the opinion of the lower courts, the plaintiffs failed to establish. I will deal with the second ground first, and will consider whether the Courts have committed an error in the finding that the plaintiffs had not made good their claim to enhancement on the ground of a rise in the average local prices of the staple food-crops. The solution of this question is to be found in section 39 of the Bengal Tenancy Act. By section 32 of the Act, it is provided that, "when an enhancement is claimed on the ground of a rise in prices, the Court *shall* compare the average prices during the decennial period immediately preceding the institution of the suit with

the average prices during such other decennial period as it may appear equitable and practicable to take for comparison." Section 39, clause (1) provides that "the Collector of every district shall prepare monthly, or at shorter intervals, periodical lists of the market prices of staple food-crops grown in such local areas as the Local Government may from time to time direct, and shall submit them to the Board of Revenue for approval or revision." By clause 4, it is enacted that "the price list shall, when approved or revised by the Board of Revenue, be published in the official Gazette." By clause (6) it is provided that "in any proceedings under the Chapter for an enhancement of rent on the ground of a rise in prices, the Court *shall* refer to the list published under this section, and shall presume that the prices shown in the lists prepared for any year subsequent to the passing of this Act are correct, and may presume that the prices shown in the lists prepared for any year prior to the passing of this Act are correct, unless and until it is proved that they are incorrect."

Now, it is not suggested that the Munsif or the lower Appellate Court referred to these lists, nor is it disputed that such lists do exist, and therefore it follows that in this suit, which is a proceeding under Chapter V, the lower Courts failed to make that reference which was imposed upon them by the terms of the law. Therefore, there has been an error of law which entitles the plaintiffs to come here and ask that it should be corrected.

Next, I shall deal with the point that the Courts have erred in so far as they have failed to give effect to the appellants' contention that the rate of rent paid by the defendants is below the prevailing rate paid by occupancy *raiyats* for land of a similar description and with similar advantages in the same village or in neighbouring villages. It appeared to the Munsif that the prevailing rate of rent could not be satisfactorily ascertained without a local enquiry, and so the Court directed a local enquiry to be held under Chapter XXV of the old Code of Civil Procedure as allowed by section 31, clause (b) of the Bengal Tenancy Act. It seems that three separate enquiries

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were held, and still the Munsif was not satisfied with the report that he got. Apparently, however, he did not think it necessary or proper to direct a further inquiry. As we have determined that the appellants are entitled to succeed on the ground of an error in relation to their objection that their contention as to a rise in prices has not had effect given to it, I think it is legitimate, in the circumstances, for us to interfere in this part of the case too, and to point out the error into which the lower courts have fallen. I am not going to enter into the question as to whether the Munsif has correctly read the last report which was made to him. I will assume, for the sake of argument, that he has correctly read it. But on this assumption he should have passed a further order indicating clearly to the revenue officer what precisely it was that he desired to be formulated in the report. The revenue officer can hardly be expected to know the requirements of the civil Courts in this respect, and it is right and proper that the civil Court, in directing a local investigation, should indicate to the officer holding the investigation what it is that the Court precisely requires, and I think it will be the duty of the Court to pass such an order now, in case the lower Court is satisfied that the present report is not sufficient for its purpose. It is said that the present report does not furnish materials on which there can be an enhancement of rent by reference to the prevailing rate in the village, and it is said that no report could be furnished which could give those materials, because the rate of rent in the village is one to which it would not be proper to refer for the purpose of enhancement, inasmuch as it is a rate of rent fixed in contravention of the provisions of the Bengal Tenancy Act. Whether that is so or not is a question of fact on which we cannot, in second appeal, pronounce any opinion. But assuming that it is so, then it would be the duty of the Court to direct a local investigation as contemplated, with reference to the neighbouring villages in regard to which no such objection prevails. So it comes to this: if the Court is satisfied that all the rent in the village should be excluded from consideration, because it is fixed in a mode which contravenes the provisions

of section 29 of the Bengal Tenancy Act, then an enquiry should be directed which will bring to light the prevailing rate of rent paid by occupancy *raiya*ts for land of a similar description and with similar advantages in neighbouring villages.

The result then is that disagreeing, as I do, with the judgment of Mr. Justice Caspersz, I hold that the decree of the lower Appellate Court was erroneous, and should be set aside, and the case should be sent back to the Munsif for rehearing in the light of these remarks.

The appellants will get their costs in the High Court, that is to say, the costs connected with the hearing before Mr. Justice Caspersz and before this Bench. The costs in the lower Courts will abide the result.

This judgment will govern the other two appeals.

Doss J. I agree.

S. M.

Appeal allowed ; case remanded.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

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April 28.

*Putni Tenure—Putni Regulation (VIII of 1819), s. 17, cl. (c)—Arrears of rent—
—Arrears previous to the current year for which the sale took place—Personal
debt—Bengal Tenancy Act (VIII of 1885) s. 65—First Charge.*

Under the Putni Regulation, VIII of 1819, s. 17, cl. (c), where the arrears of rent claimed are for balances due for periods prior to the current year for which the arrears are due when the sale is held in the middle of the year, or prior to the year preceding if the sale be held at the commencement of the following year, these balances must be treated as personal debts recoverable

* Appeal from Appellate Decree, No. 1251 of 1908, against the decree of F. S. Hamilton, District Judge of Purneah, dated March 6, 1908, confirming the decree of Nogendra Nath Das, Subordinate Judge of Purneah, dated Sept. 16, 1907

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under the ordinary procedure for recovery of debts, and not as rents recoverable under the provisions of the Tenancy law, and that in such a case the provisions of section 65 of the Bengal Tenancy Act would not have any application.

Peary Mohan Mukhopadhyaya v. Sreeram Chandra Bose (1), commented on and distinguished.

SECOND APPEAL by the plaintiffs, Jagannath and others.

This appeal arose out of a suit brought by the plaintiffs against the defendants to recover a certain sum of money as the surplus sale-proceeds of the *putni mehal* named Kalughat. The ancestor of the defendants second party, one Rahaman Buksh, held this *putni mehal* under defendants first party. Rahaman Buksh mortgaged the *putni* to the ancestor of the plaintiffs by a bond, dated the 3rd of December 1897. On the 8th of March 1905, the *putni mehal* was sold in execution of the mortgage decree which the ancestors of the plaintiffs had obtained, and was purchased by them. The sale was confirmed on the 15th of May 1905. Meanwhile, the *putni* rent due to defendants first party for 1312 M. S. having fallen into arrears, the zemindars brought the *putni* to sale under Regulation VIII of 1819, on the 15th of May 1905 (1st of Jeyt 1313 M. S.). After deducting the amount due as rent for 1312 M. S., there was a surplus of Rs. 1,011-5, which was kept in the name of defendants second party. The plaintiffs applied to get that money, but their application was refused. They brought a suit against the defendants first party for declaration of title and for recovery of the said money. The suit was decreed on the 8th of August 1905. The defendants first party brought a suit for the rent of the *putni mehal* for the period prior to 1312 M. S., in the court of the Munsif at Kishenganj, and had got the money attached before judgment. Later on they obtained a decree. The plaintiffs endeavoured to execute their decree, but found that defendants first party had attached the money. The plaintiffs then moved the District Judge to issue a notice against the defendants first party. On the 20th of December 1905, it was decided that the latter was entitled to a rateable distribution along with the plaintiffs. They appealed to the High Court

against this order, and the appeal was dismissed on the ground that no appeal lay. Hence this suit was brought by the plaintiffs.

The defendants pleaded, *inter alia*, that the surplus sale-proceeds were entirely due to them and not to the plaintiffs, as the rents for which these defendants had obtained the decree was the first charge on the *putni mehal*.

The Court of first instance holding that the plaintiffs were not entitled to any part of the surplus sale-proceeds before the amount due to the landlord defendants were paid, gave the plaintiffs a decree for the sum which was left after payment to the landlords. On appeal, the learned District Judge affirmed the decision of the first Court, on the ground that, "under section 17, clause (3) of Regulation VIII, the *putnidar* is entitled to the balance of the sale-proceeds, provided that the sale be at the commencement of the year following that for the rent of which the *putni* is brought to sale. The sale took place on the 1st Jeyt 1313 M. S. (15th May 1905), that is to say, on the first day of the second month of the Mulki year which begins from Bysack."

Against that decision the plaintiffs appealed to the High Court.

Babu Naliniranjan Chatterjee (with him *Babu Nanda Lal Banerjee*), for the appellants. The Court below has put a wrong construction upon the provisions of section 17, clause (c) of Regulation VIII of 1819. The zemindar is not entitled to get the former balance, *i.e.*, any balance prior to the period for which the sale under the Putni Regulation took place, from the proceeds of the sale. Such balance is a mere personal debt of the *talukdar*, and must be recovered in the same way as other debts by a regular suit. The zemindar has no charge upon the surplus sale-proceeds. The mortgaged property having been sold under Regulation VIII of 1819 for arrears of rent, the mortgage lien under section 73 of the Transfer of Property Act was transferred to the surplus sale-proceeds, and the plaintiffs were entitled to the sale.

Babu Satis Chandra Ghose (for *Babu Hemendra Nath Sen*), for the respondents. The zemindar had a charge over the

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surplus sale-proceeds. No doubt the decree was for the balance of the period prior to the year for which the *putni* sale took place, and it might be a mere personal debt which could not be summarily recovered under the procedure prescribed by the Putni Regulation, yet it might be a charge on the *taluk*, and the *taluk* might be sold subject to it. Section 65 of the Bengal Tenancy Act applies to the case. There is no conflict between section 65 of the Act and section 17, clause (c) of the Putni Regulation: *Peary Mohan Mukhopadhyaya v. Sreeram Chandra Bose* (1). That being so, the plaintiffs are not entitled to the surplus sale-proceeds.

Babu Naliniranjan Chatterjee, in reply.

BRETT AND SHARFUDDIN, JJ. The ancestors of the present appellants held a mortgage, dated the 19th Aghrayan 1305 M. S. (3rd December 1897), executed in their favour by one Rahaman Buksh, the ancestor of the defendants second party, by which the *putni mehal* Kalughat was hypothecated for payment of a debt. The ancestors of the appellants brought a suit on the mortgage bond to recover the debt, and obtained a decree, and, in execution of that decree, the *putni mehal* was put up to sale and was purchased by them on the 8th March 1905. The sale was confirmed on the 15th May 1905. Meanwhile, the rent due on the *putni* by the defendants second party to the defendants first-party, the zemindars, for the year 1312 M. S. had fallen into arrears, and, in consequence, the defendants first party brought the *putni* to sale under Regulation VIII of 1819 on the 15th May 1905. The *putni* was sold, and, after deducting the amount due as rent for 1312, there remained a surplus of Rs. 1,011-5 which was kept in deposit in the names of the defendants second party. The present suit was brought by the plaintiffs appellants to recover that sum of money as representing the property which had been purchased by their ancestors in the execution of the decree obtained on their mortgage. Under the provisions of section 73 of the Transfer of Property Act, the charge which the mortgagees

(1) (1902) 6 C. W. N. 794.

had on the *putni mehal* was transferred after the sale to the sale-proceeds, and the plaintiffs, therefore, claimed to be entitled to the sum of Rs. 1,011-5, as representing the charge which they had under their mortgage, and the property they had purchased under their decree. When the plaintiffs went to execute their decree, they found that the defendants first party, the landlords, had attached the money in execution of a decree obtained by them for rent due in respect of the *putni mehal* for a period prior to 1312. The plaintiffs' case was that the defendants first party had no right to attach that sum of money for the arrears due prior to 1312.

The Court of first instance gave the plaintiffs a decree for Rs. 99-5, being the balance out of Rs. 1,011-5 which remained after deducting the sum claimed by the defendants first party as rent due to them for the period prior to 1312. The plaintiffs appealed to the lower Appellate Court, but the appeal was dismissed. The plaintiffs have now appealed to this Court.

The first question which we have to decide is whether the learned Judge was right in the interpretation which he has placed on section 17, clause (3) of Regulation VIII of 1819, the Putni Regulation. The learned Judge appears to have held that, under section 17, clause (3) of Regulation VIII of 1819, the zemindars are entitled to the balance of the sale proceeds, because the arrears were due for a year preceding the year for the arrears of which proceedings had been taken under the Putni Regulation. That, however, does not appear to us to be a correct interpretation of the section. The section distinctly provides that "no former balances, beyond those of the current year (or of that immediately expired, if the sale be at the commencement of the following year), shall be included in the demand to be thus satisfied. Such antecedent balances, if the zemindar shall have omitted to avail himself of the process within his reach for having them satisfied at the time, will have become, in fact, mere personal debts of the individual *talukdar*, and must be recovered in the same way as other debts by a regular suit in the Court." Section 17, it may be mentioned, lays down the rules for the disposal of the proceeds

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of any sale made under the rules in this Regulation. In our opinion, it is clear that, under the terms of clause (3) of section 17 of the Putni Regulation, the landlords had no right to have the arrears of rent due for a period prior to 1312 paid out of the proceeds of the sale of the *putni mehal*. It has, however, been contended that, under section 65 of the Bengal Tenancy Act, the landlords have the first charge on the tenure, and that, in consequence, they are entitled to priority over the plaintiffs in recovering the money due as rent under that charge. For the appellants, it has been argued that section 65 of the Bengal Tenancy Act cannot be held to give to the landlords the first charge on the sale-proceeds of a *putni mehal* for arrears of rent due beyond those of the current year in which the sale took place, or of the year which had expired if the sale took place at the commencement of the following year, inasmuch as, under the provisions of section 17 of Regulation VIII of 1819, such antecedent balances are expressly declared to be recoverable only as personal debts of the landlord. In our opinion this view is correct, and, as we interpret section 17 of Regulation VIII of 1819, section 65 of the Bengal Tenancy Act gave to the defendants first party, the landlords, no right to recover the rent for the years previous to 1312 as being the first charge on the sale-proceeds.

It has, however, been argued on behalf of the appellants that a different view has been taken by this Court in the case of *Peary Mohan Mukhopadhyaya v. Sreeram Chandra Bose* (1). There the learned Judges expressed the opinion that there was no conflict between section 65 of the Bengal Tenancy Act and section 17, clause (3) of the Putni Regulation. The facts of that case are different from those of the present case, in that, in the case referred to, the purchaser of the *putni taluk* had purchased it in execution of a rent decree, whereas, in the present case, the *taluk* was sold under the provisions of Regulation VIII of 1819. That case, therefore, can have no application to the present case. But we may observe at the same time that we regret we are unable to agree with the learned Judges who

(1) (1902) 6 C. W. N. 794.

decided that case in holding that there is no conflict between section 65 of the Bengal Tenancy Act and section 17, clause (3) of Regulation VIII of 1819. In our opinion, in a case like the present, where the arrears of rent claimed are for balances due, as explained in section 17 of the Putni Regulation, for periods prior to the current year for which the arrears are due when the sale is held in the middle of the year, or prior to the year preceding if the sale be held at the commencement of the following year, these balances must be treated as personal debts recoverable under the ordinary procedure for recovery of debts, and not as rents recoverable under the provisions of the tenancy law, and that, in such a case, the provisions of section 65 of the Bengal Tenancy Act would not have any application. We, therefore, hold, disagreeing with both the lower Courts, that the plaintiffs are entitled to claim the surplus sale-proceeds as representing the mortgage debt due to them and the property which they had purchased in execution of the mortgage decree, and that the defendants first party, the landlords, have no right to recover from these sale-proceeds the previous balances of rent as being a first charge on those proceeds. The result, therefore, is that the appeal is decreed, the judgments and decrees of both the lower Courts are set aside, and the plaintiffs' suit is decreed with costs against the defendants first party in all the Courts.

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Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Curnduff.

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May 10.

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Receiver—Succession Certificate—Possession of property by Receiver without succession certificate—Succession Certificate Act (VII of 1889) ss. 4, 8 cl. (c)—Succession (Property Protection) Act (XIX of 1841)—Succession Act (X of 1865) s. 190—Hindu Wills Act (XXI of 1870)—Probate and Administration Act (V of 1881)—Indian Securities Act (XIII of 1886) ss. 3 sub-s. (2), 6 sub-s. (1) cl. (f).

The position of a Receiver appointed by a Court is analogous to that of a curator appointed under Act XIX of 1841, who is a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage.

Babasab v. Narsappa (1), referred to.

The Receiver ordinarily is not the representative or agent of either party to a suit in the administration of the trust, but the appointment is for the benefit of all parties, and he holds the property for the benefit of those ultimately found to be the rightful owners.

Jagat Tarini Dasi v. Naba Gopal Chaki (2), *Corporation of Dacup v. Smith* (3), *Portman v. Mill* (4), referred to.

In the absence of any provision in the Hindu Wills Act (XXI of 1870) and in the Probate and Administration Act (V of 1881) "that no right to the property of an intestate can be established unless administration had been previously granted by a competent Court," the Receiver appointed by Court is competent to take possession of the securities and moneys without a certificate under section 4 of the Succession Certificate Act; but regard being had to the provisions of the Indian Securities Act, 1886, and section 3, sub-section (2), section 6, sub-section (1) clause (f), and section 8, clause (c) of the Succession Certificate Act (VII of 1889), a Succession Certificate would be needed if a suit was brought to establish a title to such funds by right of inheritance.

APPEAL by the defendants, Harihar Mukerjee and another.

The plaintiff, Harendra Nath Mukerjee, brought a suit for partition of the estate of his father, Debendra Nath Mukerjee,

*Appeal from Original Order No. 39 of 1909 against an order of Raj Krishna Banerji, Subordinate Judge of 24-Parganas, dated Nov. 11, 1908.

(1) (1895) I. L. R. 20 Bom. 437.

(3) (1890) 44 Ch. D. 395.

(2) (1907) I. L. R. 34 Cal. 305.

(4) (1839) 3 Jurist 356.

who died intestate, and on the 4th of December 1908 was appointed Receiver of the properties consisting, amongst others, of Government promissory notes of the value of Rs. 20,000 and cash to the extent of Rs. 25,000 in deposit on current account with the Bank of Bengal, and other securities with the Bank to meet overdrafts. On the 4th of May 1908 he applied to the Subordinate Judge for a direction on the Bank to deposit the funds in Court. The learned Judge, however, on the 11th of November 1908, passed an order authorising him to draw the moneys and negotiate the Government promissory notes after taking out a Succession Certificate from the proper Court. Against that order the defendants, the infant brothers of the plaintiff, appealed to the High Court.

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Babu Mahendra Nath Roy and Babu Baranashibasi Mukerjee,
for the appellants.

Babu Satish Chandra Mukerjee, for the respondent.

The Senior Government Pleader (Babu Ram Charan Mitter),
as *amicus curiæ*, for the Secretary of State for India.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. The question of law raised in this appeal is one of some novelty and relates to the right of a Receiver to take possession of the subject-matter of the litigation in which he has been appointed, without a Succession Certificate from the proper Court. The circumstances under which the question arises for decision are not the subject of controversy before us. One Debendra Nath Mukerjee, a wealthy Hindu, governed by the Dayabhaga law and resident of Kidderpore in the suburbs of this city, died intestate on the 16th July 1907. He left a widow, three sons and five daughters. Shortly after his death, on the 9th December 1907, a suit was commenced by his eldest son, Harendra Nath, for partition of the family properties. On the 4th December 1908, Harendra Nath was appointed Receiver of the subject-matter of the litigation. Part of the estate of Debendra Nath, which had been inherited by his sons, consisted of Government securities of the

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value of Rs. 20,000, cash to the extent of Rs. 25,000, in deposit in current account with the Bank of Bengal, and also other Government securities which had been endorsed in favour of the Bank with a view to meet any possible overdraft. It became necessary upon the appointment of Harendra as Receiver that he should take possession of these funds, and on the 4th May 1908 he applied to the Court that a letter might be sent to the Bank with a view to their deposit in Court. On the 11th November 1908, the Court directed him to draw the moneys and negotiate the Government promissory notes after he had taken out a certificate from the proper Court. On the 11th February 1909 the defendants in the suit, who were the infant brothers of Harendra Nath, preferred the present appeal against the portion of the order which directed the Receiver to take out a Succession Certificate. When the appeal came to be heard, the Receiver, who was the respondent, intimated to the Court that he would not oppose the appeal, because it was quite as much his interest as that of his brothers to have the order modified, in so far as it made a Succession Certificate an essential pre-requisite to the withdrawal of the money and the negotiation of the Government promissory notes. As the question involved in the appeal was one of great importance and not altogether free from difficulty, and as our decision might affect the Government revenue, we directed notice of the appeal to be served on the learned Government pleader. Subsequently, the appeal was re-argued by the learned vakil for the appellants on one side and the learned Government pleader on the other. After careful consideration of the arguments which have been addressed to us, we are of opinion that the appellants are entitled to succeed.

Section 4 of the Succession Certificate Act, 1889—we quote so much only of the section as may have any possible application to the case before us—provides that no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, or to any part thereof, except on the production by the person so claiming of a probate or letters of administration,

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evidencing the grant to him of administration to the estate of the deceased, or a certificate granted under this Act and having the debt specified therein. Let us assume for a moment that a sum in deposit in current account with a Bank is a debt within the meaning of this Act. Let us also assume that the sum advanced by way of loan under a Government promissory note is also a debt within the meaning of the section. The question arises, whether a Receiver appointed by a Court can be properly described as a person claiming to be entitled to the effects of the deceased person. The answer to this question must depend upon the true position of a Receiver appointed to take charge of the subject-matter of a litigation. It has been suggested by the learned Government pleader that the position of a Receiver is precisely the same as that of the person who ultimately turns out to be the true owner, and that, as such person cannot enforce his rights in respect of a debt due to the deceased person to whose effects he claims to be entitled, without the production of a Succession Certificate, the Receiver is in no better position : and that, if a contrary view were adopted, the State would be deprived of a source of revenue which was clearly within the contemplation of the Legislature when section 4 of the Succession Certificate Act was framed. In our opinion, there is no foundation for this contention. It is well settled that a Receiver by his appointment does not become the representative of the parties, but is an officer and representative of the Court which appoints him. The effect of the appointment of a Receiver is to bring the subject-matter of the litigation in *custodia legis*, and the Court can effectively manage the property only through its officer, who is the Receiver. In other words, the Receiver ordinarily is not the representative or agent of either party in the administration of the trust, but his appointment is for the benefit of all parties, and he holds the property for the benefit of those ultimately found to be the rightful owners : see *Jagat Tarini Dasi v. Naba Gopal Chaki* (1), where it is pointed out that the Receiver is the representative of the Court and may, by a fiction of law, be deemed the

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right arm of the Court in exercising the jurisdiction invoked in such cases for administering the property, because the Court can only administer through a Receiver : see also *Corporation of Bacup v. Smith* (1) and *Portman v. Mill* (2). No doubt, in some cases, the expression is used that the Receiver may be considered as a representative of the parties to the suit ; but this is only in the sense that, as against an adverse claimant, his title does not stand higher than that of the parties to the litigation—a doctrine which is recognized in the Civil Procedure Code of 1908, order XL, rule 1, sub-rule (2). It cannot, therefore, be affirmed that a Receiver, when he seeks to take possession of the subject-matter of the litigation, “ claims to be entitled to the effects of the deceased person.” His position in this respect is analogous to that of a curator appointed under the Succession (Property Protection) Act (XIX of 1841), as regards whom it has been held in *Babasab v. Narsappa* (3) that he is not a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage. A Receiver, quite as much as a curator, is in no sense a representative of the deceased person ; he is merely entrusted by the Court with certain powers over the estate for a temporary purpose. It has been suggested, however, by the learned Government pleader that, if this view is adopted, not only may the State lose its revenue, but the protection which is intended to be afforded to debtors by the Succession Certificate Act may be completely lost. In our opinion, there is no foundation for any such apprehension. When a Court takes possession of the subject-matter in dispute, and subsequently makes over the property to the person who is adjudged to be the true owner, no question can possibly arise as to the protection to be afforded to parties who pay their debts, because the sum paid by the debtors finds its way into the hands of the person who is judicially determined to be entitled thereto ; in such a contingency, it may well be assumed that the Legislature did not intend that recourse should be had to the provisions of the Succession

(1) (1890) 44 Ch. D. 395.

(2) (1839) 3 Jurist 356.

(3) (1895) I. L. R. 20 Bom. 437.

Certificate Act. The substance of the contention of the learned Government pleader is that no one ought to be entitled to realise debts due to a deceased person who has not established his representative character in a Court of competent jurisdiction. The policy of the Legislature, however, so far as may be gathered from the statutory provisions upon the subject, points to a contrary conclusion. It is well-known that, although section 190 of the Indian Succession Act, 1865, provides that no right to the property of an intestate can be established unless administration has been previously granted by a competent Court, this section was not incorporated either in the Hindu Wills Act, 1870, or in the Probate and Administration Act, 1881. If a provision of this description had found a place in either of the later statutes, the result would have been that, in the case before us, the parties would not have been entitled to put forward any claim to the estate of their father till they had taken out letters of administration. In the absence of any such provision, we must hold that the Receiver is competent to take possession of the securities and moneys in the hands of the Bank of Bengal without a certificate under section 4 of the Succession Certificate Act, the provisions of which are clearly inapplicable. In this view it is unnecessary to discuss whether the expression "debt" is not comprehensive enough to include the securities and moneys in question. But it may be pointed out that the provisions of the Indian Securities Act, 1886, and those of section 3, sub-section (2), section 6, sub-section (1), clause (f), and section 8, clause (c) of the Succession Certificate Act, indicate that a Succession Certificate would be needed for the purpose, if a suit was brought to establish a title to these funds by right of inheritance.

The result, therefore, is that this appeal must be allowed, and the order of the Court below varied. The Receiver will be entitled to draw the moneys in deposit and negotiate the Government promissory notes without a Succession Certificate. There will be no order as to costs.

Appeal allowed.

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APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Harington and Mr. Justice Woodroffe.

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Libel—Words defamatory per se—Imputation of criminal offence—Fair Comment—Privileged occasion—Hansard's Parliamentary Reports, admissibility of—Statement of Newspaper Correspondent—Evidence of bad character—Proceedings in Parliament—Evidence Act (I of 1872) ss. 55, 57, 78 (2)—Malice—Plaintiff's political character—Deportation—Regulation III of 1818—Judicial notice—Issues—Reputation—Damages, assessment of.

The expression "that the plaintiff has been guilty of tampering with the loyalty of the Punjab Sepoys" amounts to an imputation that he has been guilty of an offence under sections 124A and 131 of the Indian Penal Code, and is punishable with transportation for life.

A fair comment on matter of public interest is not libel.

Mervale v. Carson (1) referred to.

Per HARRINGTON J. Imputing a criminal offence to a person is not fair comment, and that the fact that another person on a privileged occasion made a similar statement is no protection to the defendants.

Publication of a fair and an accurate report of proceedings in the Parliament is privileged even though the words are defamatory.

Wason v. Walter (2) referred to.

A libel, which is privileged when it appears as the report of a speech in Parliament, is not privileged when it appears as the statement of a newspaper correspondent.

The proceedings of Parliament may be proved, under section 78 (2) of the Evidence Act, by the Journals of the House of Commons or by copies purporting to be printed by order of the Government.

Where the gist of the action was damage to the plaintiff's character, the defendants were entitled to show that the plaintiff was a person whose reputation would not be damaged by a particular libel in question.

The fact that the plaintiff was a man of considerable influence in the Punjab, and took part in a meeting calculated to influence the minds of the people against the Government, and that he was deported seven weeks after the meeting under a Regulation empowering the Government to take that step for the purpose of preserving a portion of His Majesty's dominions from internal commotion, should be taken into consideration in assessing the damages.

In mitigation of damages, the defendants can give evidence of the plaintiff's bad character, but not evidence of rumours and suspicions of bad character.

* Appeal from Original Decree, No. 35 of 1909.

(1) (1887) 20 Q. B. D. 275. 283.

(2) (1868) L. R. 4 Q. B. 73.

Scott v. Sampson (1) referred to.

Per WOODROFFE J. Subject to certain well-known limitations, that which has probative force is evidence.

The deportation of the plaintiff was evidence as throwing light on the character of his agitation previous thereto and as thus affecting damages.

The presumption of regularity required that it should be assumed that the deportation appeared to Government to be necessary. When the presumption had operated to this extent, the fact presumed might itself form the basis of a further inference that what had appeared to be necessary had so appeared, because there was an actual cause in fact for such appearance.

The subject of 'judicial notice' discussed; and the meaning of section 57 of the Evidence Act explained.

Hansard is an appropriate book of reference in case of Parliamentary debates.

Fair comment is not a branch of the law of privileged occasion. The law as to fair comment stated.

The Code requires that issues should be settled on the Original Side of the High Court.

Reputation includes both character and disposition, and disposition is not the less proven because it appears on the face of the facts deposed to by the plaintiff himself, or is a proper inference from those facts.

Assessment of general damages discussed.

The English cases which deal with the question of the revision of damages by the Court of Appeal have no application in this country, where the Jury system, with respect to which the English decisions have been given, does not prevail.

APPEAL by "The Englishman," Limited, from the judgment (2) of Fletcher J.

The facts are briefly as follows. The plaintiff, Lala Lajpat Rai, a landed proprietor of the Punjab and a vakil of the Punjab Chief Court, who was confined in the Mandalay jail under orders of the Government of India issued under Regulation III of 1819 (extended to the Punjab by Act IV of 1882) and released on the 17th November 1907, brought an action against the proprietors, editors, printer and publisher of *The Englishman*, a daily newspaper published in Calcutta, for damages for libel published by them on the 10th of September 1907.

The passages imputing libel to the plaintiff are fully set out in the judgment of Harington J.

The defendants admitted the publication, but denied that the words were published maliciously or with intent to injure

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(1) (1882) 8 Q. B. D. 491.

(2) (1909) I. L. R. 36 Calc. 883, 886.

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the plaintiff, and alleged that in so far the words consisted of allegations of facts, they were true in substance and in fact, and were published in the belief that they were true; and that, in so far as they consisted of expression of opinion, they were a fair comment made in good faith without malice, and on matter of public interest and importance, and that the plaintiff had no cause of action.

On the suit coming on for hearing, the defendants took the plea that the publication was privileged, and prayed for an amendment of the written statement to that effect; but the plea was disallowed.

Fletcher J. held that the libel imputed to the plaintiff the commission of an offence punishable, under section 131 of the Indian Penal Code, with transportation for life, and that the statements of facts made by the defendants were not true and that the comments were unfair; and his Lordship gave judgment for the plaintiff awarding Rs. 15,000 as damages.

The defendants appealed.

The Advocate-General (Mr. Kenrick, K.C.) (with him *Mr. Bagram*), for the appellants, described the social position of the plaintiff and the part he took at political meetings in 1907, at a time when the Punjab was in a state of political agitation and unrest, the plaintiff's association with Ajit Singh and the fact of the deportation of both Ajit Singh and the plaintiff on the 9th of May 1907, the fact of certain questions being put in the House of Commons, the replies thereto by the Secretary of State, the publication of the speech of the Secretary of State, and the reports of Hansard's Parliamentary Debates. It was pointed out that Lord Morley as Secretary of State for India had publicly asserted in the House of Commons that the plaintiff had been arrested "for the active promotion of open sedition, that the reason of his arrest and deportation was to preserve a portion of His Majesty's dominions from internal commotion, and that his actions constituted him a danger to the State."

On the plea of justification, it was urged that it was clear, from the evidence on the cross-examination of the plaintiff, that

the plaintiff's conduct was calculated to influence adversely the loyalty of the Punjabi sepoys, and the defendants were therefore entitled to make such *bonâ fide* comments in their newspaper as they thought proper. As to plaintiff's character, the fact of deportation, which was relevant and material, showed that the Government regarded his presence as a danger to the community. It was further contended that the plaintiff's political reputation had been necessarily prejudicially affected by his conduct antecedent to, and resulting in, his deportation by the executive act of the Government; that the fact of deportation, the most significant event in his life, must be taken into consideration by the Court, and that, in the circumstances, the plaintiff could not recover substantial damages, but at the most was entitled to merely nominal damages.

[HARINGTON J. There is a great distinction between a conviction in a Court of law, which is made in the presence of the defendants after hearing the defence, and deportation as in the present case.]

The Advocate-General. We are entitled to assume that the greatest and most anxious care had been exercised by the Executive Government in enquiry into the facts prior to the order for deportation. The Court is bound to assume regularity in the performance of official acts.

The presumption embodied in the maxim *omnia præsumuntur rite esse acta* applies equally to an order for deportation as to the sentence of a Court on a conviction for crime.

On the plaintiff's own admission, he was a leading politician and had taken a prominent part in local politics. He admitted that there was political unrest in the Punjab, and the evidence established that he had made inflammatory speeches calculated to influence the minds of the men attending the meeting prejudicially towards the Government, and by such conduct had laid himself open to comment. A newspaper is justified in making *bonâ fide* comments on matters of public importance and interest, even if such comments contain defamatory matter.

[WOODROFFE J. But this is justification. This plea was withdrawn.]

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The Advocate-General. Though the plea of justification was verbally withdrawn at the trial, the cross-examination of the plaintiff in itself disclosed that there was no ground of action. The plaintiff was awarded substantial damages, although he has not sustained any injury to reputation or any pecuniary loss.

As to the admissibility in evidence of reports of speeches contained in Hansard's Parliamentary Debates, it was submitted that they were relevant and admissible. Under section 57 of the Evidence Act, 1872, the Court is obliged to take judicial notice, without proof, of the course of proceedings in Parliament. In all matters of public history the Court may resort for its aid to appropriate books of reference. Hansard's Debates were the most appropriate and authoritative work of reference available.

Lord Morley's speech was next referred to in detail, and it was argued that regard being had to what transpired in the House of Commons, Lajpat Rai had not such a political reputation as would entitle him to substantial damages.

[HARINGTON J. What would an ordinary reader understand by the expression "Lajpat Rai had been guilty of tampering with the loyalty of the Punjab sepoys?"]

The Advocate-General. A reader could not properly come to the conclusion that it necessarily imputed a criminal offence under section 131 of the Indian Penal Code, as was alleged by the learned Judge at the trial. To "tamper" means "to meddle with" or even "to influence in a bad way." "To tamper with loyalty" may mean to diminish or deteriorate the quality of affection or loyalty, without necessarily imputing the commission of the crime of attempting to seduce from allegiance. The words are not defamatory or actionable *per se*. To support an action the plaintiff should aver, and the evidence should sustain, an innuendo that the words impute a criminal offence.

Mr. Bagram (following). Section 131 of the Indian Penal Code is not applicable. The admitted facts show that no false statements have been made. The position and influence of the plaintiff being proved, it was apparent the people would

follow and adopt his views. As regards Hansard's Reports, they are authoritative statements of what happened in Parliament. Sections 57 and 58 of the Indian Evidence Act, Woodroffe's Evidence Act, page 345, referred to. It was further submitted that the occasion was a privileged one, because comments were made on matters of public interest and national importance: *Salmon v. Isaac* (1), *Peter Walker & Son v. Hodgson* (2), *Henwood v. Harrison* (3), *Wason v. Walter* (4).

The debates in Parliament are absolutely privileged, and in the case of comment it is held to be a qualified privilege: *Merivale v. Carson* (5), *McQuire v. The Western Morning News Company, Ltd.* (6), *Allbutt v. The General Council of Medical Education* (7), *Pittard v. Oliver* (8), *Jenoure v. Delmege* (9).

It was submitted that there was no libel because plaintiff admitted it himself, and that, if libel, the occasion was privileged; and that in any event the damages were excessive.

Mr. A. Chaudhuri (with him *Mr. B. Chakravarti*, *Mr. B. C. Mitter* and *Mr. B. K. Lahiri*), for the plaintiff respondent. As regards the statements in the House of Commons, the defendants were not entitled to prove anything by the production of Hansard's Parliamentary Debates. Even assuming that they were entitled so to do, the statements were not relevant issues in this case.

Hansard's Parliamentary Debates are not admissible: see Phipson on Evidence, 4th edition, page 511; Law Times Report of the 4th March 1908; Starkey on Evidence, pages 281, 282; Roscoe's Evidence, page 109. If Hansard was not evidence in England, it could not be evidence in this country.

The matter contained in the article was *prima facie* libellous. On the question of "privilege," if the defendants failed to show that it was a fair comment it would be libel: *Hunt v. The Star Newspaper Company, Ltd.* (10), *Peter Walker & Son v. Hodgson* (2).

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(1) (1869) 20 L. T. 885, 886.

(2) [1909] 1 K. B. 239.

(3) (1872) L. R. 7 C. P. 606.

(4) (1868) L. R. 4 Q. B. 73.

(5) (1887) 20 Q. B. D. 275, 283.

(6) [1903] 2 K. B. 100, 111.

(7) (1889) 23 Q. B. D. 400.

(8) [1891] 1 Q. B. 474, 479.

(9) [1891] A. C. 73.

(10) [1908] 2 K. B. 309.

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In the present case it was also clear that the whole object of the writer was to create public opinion against the plaintiff and to influence the Government so that he might be kept in prison for an indefinite period. Deportation under Regulation III of 1818 was merely an executive act.

[WOODROFFE J. Would not deportation throw light upon the plaintiff's character on the admitted facts?]

Mr. Chaudhuri. The plaintiff had opposed certain Government measures, as every subject of the Crown was entitled to do, but he had not organised the meeting complained of and had no intention of attending it. He was ultimately prevailed upon to attend, and settled a memorial and made a speech upon it. The object was that the Government might veto the Bill then under consideration. There might have been public excitement at the time, but nothing was said or done to charge the plaintiff with tampering with the loyalty of the sepoys. He had taken no part in causing disaffection against the Government. The plea of justification had been deliberately withdrawn in the Original Court. It was not attempted to justify the libel on plaintiff's evidence and Hansard's Parliamentary Debates. The plaintiff *ex concessis* was a man of exemplary character. This was certainly a case for substantial damages. The writer purports to speak from personal knowledge. He has not based anything on Hansard. An appeal to Hansard was a subterfuge. The following cases were cited and discussed: *Barrow v. Hem Chunder Lahiri* (1), *Henwood v. Harrison* (2), *Thomas v. Bradbury Agnew & Co.* (3), *Hunt v. The Star Newspaper Co., Ltd.* (4), and the other cases cited by the appellants. For damages, see the observations by Lord Mansfield in *Wilkes v. Wood* (5).

Mr. B. C. Mitter (on the same side). The circumstance which, if pleaded, would have been a bar to an action for libel, cannot be given in evidence in mitigation of damages.

The Advocate-General, in reply. If the occasion was such as to rebut *prima facie* presumption of malice, then there was privilege:

(1) (1908) I. L. R. 35 Cal. 495.

(3) [1906] 2 K. B. 627, 638-9.

(2) (1872) L. R. 7 C. P. 606.

(4) [1908] 2 K. B. 309, 318-321.

(5) (1763) 19 Howe, St. Tr. 1167.

Henwood v. Harrison (1). Any fair comment or criticism on matters of public importance is privileged. The matter might be in the form of a comment or direct assertion, and if it was *bonâ fide* and without malice, it would not be actionable nor defamatory even if inaccurate. The source of comment need not appear.

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In this case the defendants were not actuated by malice : *McQuire v. The Western Morning News Company* (2), *Peter Walker & Son v. Hodgson* (3), *Davis v. Shepstone* (4), *Wason v. Walter* (5), *Mangena v. Wright* (6). The article complained of was, therefore, a fair comment.

If damages are at all to be awarded in this case, they should be contemptuous damages. The plea of justification having been withdrawn, the facts of the case should be taken into consideration in mitigation of damages : *Chalmers v. Shackell* (7), Mayne on Damages, 7th edition, p. 514.

HARINGTON J. This is an appeal from a decree of this Court in its Original jurisdiction, under which the plaintiff was awarded damages to the extent of Rs. 15,000 for libel.

The libel was in the following terms :—

"It is about time now that the true facts as to the deportation of Lajpat Rai were given out. Last year the native officers of several of the native regiments in the Punjab confidentially reported to their commanding officer that persistent efforts were being made to tamper with the loyalty of the sepoys. In due course the commanding officer reported this to the higher military authorities. At the beginning of this year the native officers of almost every native regiment reported to their commanding officers that the provisions of the Canal Colonies Bill were being used most effectively by the agitators to inflame the sepoys against the Government, and in this connection the names of Lajpat Rai and Ajit Singh were given as the principal agitators. It must be remembered that

(1) (1872) L. R. 7 C. P. 606.

(4) (1886) 11 App. Cas. 187.

(2) [1903] 2 K. B. 100, 111.

(5) (1868) L. R. 4 Q. B. 73, 96.

(3) [1909] 1 K. B. 239, 253.

(6) [1909] 2 K. B. 958.

(7) (1834) 6 C. & P. 475.

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the Canal colonists are mostly old soldiers, therefore in close touch with the sepoys. The native officers further urged that unless the provisions of the Canal Colonies Legislation were vetoed they could not answer for the loyalty of the native army in the Punjab. The commanding officers confidentially told Lord Kitchener that unless the Canal Colony Legislation was vetoed, and Lala Lajpat Rai and Ajit Singh arrested, they could not answer for the loyalty of the native army in the Punjab. Lord Kitchener lost no time in seeing Lord Minto, and the latter at once telegraphed to the civil authorities in the Punjab for corroboration of these alarmist reports. The civil authorities at Lahore were already in a panic as to the occurrences at Lyallpur and promptly confirmed all Lord Kitchener's statements, but they demurred to the vetoing of the Canal Colonies Legislation, and said the deportation of Lajpat Rai and Ajit Singh would be sufficient. Lord Minto was inclined to side with the civil authorities in the Punjab, but Lord Kitchener put his foot down and said that if the Canal Colony Legislation was not vetoed, and Lajpat Rai and Ajit Singh deported, he would resign as a protest. As neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed and Lajpat Rai and Ajit Singh deported. I assert the truth of these statements in spite of any official denials. A long residence in India has taught me that between an official denial and a terminological inexactitude there is a distinction without any real difference. Anyway these statements explain the silence of Mr. Morley about Lala Lajpat Rai under the daily heckling he has endured in Parliament for months past. My only reason for now publishing these statements is the half promise given by Mr. Morley in Parliament for the release of Lajpat Rai. That Lajpat Rai has been guilty of tampering with the loyalty of the Punjabi sepoy there can be no possibility of doubt, and, therefore, his release for years to come would only be a dangerous act of criminal folly. The very virtues of Lajpat Rai only make him more dangerous, and it is the half-religious, half-political fanatics of this half-

sane, half-mad brand that are always the most dangerous conspirators."

The defendants admitted publication and alleged that, in so far as the libel consisted of allegations of fact, it was true, and in so far as it consisted of expressions of opinion, they were a matter of fair comment on a question of public interest.

The alleged libel was published in an issue of the defendant's newspaper on September 10th, 1907. In the early part of that year there had been considerable discontent in the Punjab : a Bill, called the Canal Colonization Bill, was pending before the Punjab Legislative Council : it was a very unpopular measure amongst certain classes of the community, and was subsequently vetoed by the Government : this proposed piece of Legislation afforded to those who were desirous of prompting discontent a ready means of inflaming the minds of the community.

So serious was the state of affairs that the Government was compelled to have recourse to Regulation III of 1818, and under that Regulation the plaintiff and Ajit Singh were deported.

It was while the plaintiff was in custody under that Regulation that the defendants published the article complained of.

At the trial, the defendants stated that they would not proceed with their plea of justification : they contended that they were not liable in damages because, in the House of Commons, the Secretary of State for India, both in the answers which he gave to questions relating to the plaintiff, and in speeches which he made on the same subject, had made in effect the same statements as those which appeared in their newspaper : they also relied on the circumstance that the plaintiff had in fact been deported.

The learned Judge was of opinion that the libel imputed to the plaintiff the commission of an offence punishable under section 131 of the Indian Penal Code with transportation for life : that the statements of fact made by the defendants were false and the comments were unfair, and has awarded to the plaintiff damages to the extent of Rs. 15,000.

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For the appellants it has been argued (i) that the words referring to the plaintiff are not defamatory *per se* and do not in themselves allege the commission of a criminal offence. (ii) That the statements which do refer to the plaintiff were comments made *bonâ fide* on allegations made in Parliament, and that the defendants were entitled to make use of statements made by the Secretary of State in Parliament. (iii) That the alleged libel only defamed the plaintiff politically. The damages, therefore, should have been nominal, for the plaintiff after having been deported had no political reputation to lose.

The first question to be considered is as to what is the meaning to be attached to the libel. It contains, *inter alia*, the statement that "Lajpat Rai has been guilty of tampering with the loyalty of the Punjabi sepoys." It has been argued that the expression "tamper with the loyalty of a sepoy" means something less than "attempt to seduce a sepoy from his duty," and reliance is placed on the derivation of the word "tamper" and the meaning put on it in the dictionary. To my mind little importance can be attached to this. The question to be decided is, what would a reasonable man understand to be conveyed by the alleged libel? To ascertain this, the libel must be read as a whole. Now, the article contains a statement that native officers in the native regiments in the Punjab confidentially reported to their commanding officers that persistent attempts were being made to tamper with the loyalty of the sepoys: that the Canal Colonies Bill was being used to inflame the sepoys against the Government: that the native officers urged that unless the Canal Colonies Bill was vetoed, they could not answer for the loyalty of the native army in the Punjab.

If the article containing these passages be read as a whole, I think that the statement in the article "That Lajpat Rai has been guilty of tampering with the loyalty of the Punjab sepoys" would convey to the ordinary mind that Lajpat Rai had utilized the Canal Colonies Bill as a means of making the Punjab sepoys so disloyal that they could not be trusted to obey, and would not obey the orders of their officers.

I think it amounts to an allegation that the plaintiff has attempted to seduce the soldiers from their duty, and that he has attempted by word or otherwise to excite feelings of disaffection to the Government established by law in British India. This, in my opinion, amounts to an imputation that he has been guilty of offences under section 124A and 131 of the Indian Penal Code, and these offences are punishable by transportation for life.

My view of the meaning of the article complained of disposes of the appellants' contention that it is fair comment on a matter of public interest.

The fact of the plaintiff's deportation: the question whether he should be released or not: were topics of public interest on which the defendants in common with all the other subjects of the King were entitled to comment fairly, and to express opinions either in favour of or against any proposal to release the plaintiff. Had the defendants, therefore, contented themselves with commenting on the fact of deportation of the plaintiff, and confined themselves to expressions of opinion as to the propriety of his release or otherwise, there would have been nothing to complain of as long as the comment was fair—for it is well-settled that fair comment on a matter of public interest is not libel: see *Merivale v. Carson* (1) at page 283 per Bowen, L. J. But the defendants have gone further and have stated that the plaintiff has been guilty of a criminal offence: that is a statement of fact which, not having been justified by the defendants, must be presumed to be untrue. The article, therefore, contains an untrue statement of fact concerning the plaintiff for which the maker is liable in damages; the question, therefore, whether the remainder of the article is comment or not has no bearing on the question whether the defendants be liable or not.

When it is admitted that the alleged libel was published, that it referred to the plaintiff, and it is established that the libel contains a statement that the plaintiff has committed an offence for which he is liable to be punished as a criminal, then

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(1) (1887) 20 Q. B. D. 275, 283.

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the publisher of the libel will be liable in damages unless he can show that the libel is true, or that it was published *bonâ fide* and without malice on a privileged occasion. In the present case the plea of justification has been withdrawn: the defendants did not plead that the occasion was privileged: the only question, therefore, which remained was the question of damages.

In my opinion, if a person takes upon himself to publish on his own authority in a newspaper to the world at large that another has committed a criminal offence, he will be liable in damages unless he is able to prove at the trial that what he published is true in substance and in fact.

But it has been argued in the present case that the defendant is not liable, because it was stated in the House of Commons by a responsible Minister of the Crown that the plaintiff had been tampering with the sepoys—the defendant was entitled to accept that statement and to comment on it: the statements of fact, therefore, the defendant might lawfully repeat without incurring any liability: and he was entitled to comment on this statement in his newspaper.

Now, it is well-settled law that the publisher of a newspaper is entitled to publish a fair and accurate report of proceedings in Parliament, even though the report contains statements which are defamatory of an individual: *Wason v. Walter* (1).

I agree that the defendant was entitled to publish that the Secretary of State for India had made in the House of Commons such and such a statement, and as long as he published a substantially accurate account of what was said in the House of Commons, not as a statement of his own, but as a statement made in that place, then I think he would be doing nothing unlawful.

But in the present case the libel complained of does not purport to be a report of what any one said in the House of Commons. It begins with the words "It is about time now that the true facts as to the deportation of Lajpat Rai were given out." The inference which would be drawn by the ordinary reader would be that the true facts had not been given out either in

(1) (1868) L. R. 4 Q. B. 73.

Parliament or elsewhere, and that the assertions of fact that the writer goes on to make were based on information not accessible to the public. The only reference to what was said in Parliament is a reference, not to any statement of fact, but to a "half promise given by Mr. Morley in Parliament for the release of Lajpat Rai."

No doubt the fair and accurate report of a speech made in Parliament is privileged, even though it contains facts defamatory to the plaintiff. But no authority has been cited for the proposition that a person is entitled to republish those defamatory statements, not as a report of what has been said in Parliament, but as a statement of his own.

Such a proposition is directly contrary to the law laid down by the learned author of Odgers on Libel and Slander, 4th Edition, page 169, who says that the prior publication of a libel is no justification for its being copied and republished. If the first publication be privileged, that will not render the second publication privileged. I have no doubt that this is a correct statement of the law, and that a libel which is privileged when it appears as the report of a speech in Parliament is not privileged when it appears as the statement of a newspaper correspondent.

At the trial a large body of evidence was admitted as to what had been said in the House of Commons by Mr. Morley and by a number of other members of Parliament.

Had the statements of fact in the article published by the defendant purported to be statements of what was said in Parliament, then no doubt evidence of what was said would be admissible on the question whether the defendant had published a fair and accurate report of what was then said. But in the present case the statements of fact do not purport to be quotations from speeches made in the House of Commons.

The issue, therefore, whether they were fair and accurate statements of what was said in the House of Commons does not arise. I do not think, therefore, that what was said in the House of Commons was relevant to any issue raised in this case. If it be assumed that the assertions of fact which are

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defamatory of the plaintiff were made in the House of Commons, that circumstance does not affect the liability of a person who takes these defamatory statements and publishes them to the world as his own.

Then it is argued that the defendant was entitled to rely on the fact that plaintiff had been deported, and on the statements made about him in the House of Commons, as showing that he was a person whose character and reputation were such as to disentitle him to anything but nominal damages.

Since the decision on *Scott v. Sampson* (1), it has been settled that a defendant can, in mitigation of damages, give evidence of the plaintiff's bad character, but that evidence of rumours and suspicions to the same effect as the defamatory matter cannot be given.

But assuming that evidence of what was said in the House of Commons was admissible, can what was said there be proved without procuring the evidence of some person who was present and heard what was said. It is contended by the defendant that what was said in Parliament can be proved by the production of the volume of Hansard's Reports of Parliamentary Debates containing a report of the speech it is desired to prove. That, it is said, is sufficient without the evidence of the person who made the report, or any person who was present when the speech was made.

In strictness, a speech would be proved by calling the reporter, or obtaining his evidence on commission. He could produce the report he had made at the time, and refreshing his memory from what he had written down when the speech was delivered, he could prove what the speaker said—and he would be liable to be cross-examined to show that he had misreported what was said. On principle, if it is sought to prove things said, some person in whose presence the things were said must be called, in order that the person against whom the evidence is given may be enabled to question its accuracy by cross-examination.

(1) (1882) 8 Q. B. D. 491.

It is contended that this does not apply in this country, and that, under the provisions of section 57 of the Evidence Act, Hansard's Reports are admissible for the purpose of proving what was said in the House of Commons.

Section 57 provides that the Court shall take judicial notice of "the course of proceeding of Parliament:" but the course of proceeding appears to be something distinct from the proceedings themselves: they may be proved under section 78 (2) by the journals of the House of Commons or by copies purporting to be printed by order of the Government. If, therefore, it had been necessary for the defendant to prove the proceedings of the House of Commons, he could by statute have done so by producing a copy of the Journal of the House of Commons purporting to be printed by order of the Government without calling any person who was present at the proceedings. There is no evidence as to whether the speeches of the questions put, and answers given thereto, are recorded in the Journals of the House as part of the proceedings of the Legislature. I infer, therefore, that they are not so recorded. If they were, they could be proved as provided by section 78 (2).

Then it is contended that a speech made in Parliament is a matter of public history on which the Court may resort for its aid to appropriate books or documents of reference, and that Hansard is such an appropriate book.

This section does not appear to me to have the effect of absolving the parties from any rules governing the proof of facts on which they desire to rely. It is to be observed that the section does not say how any fact, historical or otherwise, is to be proved by the parties, but gives the Court liberty to resort for its aid to appropriate books or documents of reference on matters of public history.

I will not attempt to define a matter of public history, but, even if it be assumed that the fact that the plaintiff was deported for sedition be regarded as a matter of public history, I do not think that the terms of a speech made by a person who is not yet a historical personage, in the presence of persons who still exist, can be said to be a matter of public history. I do

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not think the section which enables the Court to look at a book of reference for its own aid absolves a party from producing the best evidence available of any fact which he desired to prove, and a report, whether published in Hansard or elsewhere, is not the best evidence which can be procured.

To sum up my view of the case :

The article complained of contains the imputation that the plaintiff has committed a criminal offence. This is not comment. The fact that another person on a privileged occasion made a similar statement, even if proved, is no protection to the defendants, because they do not purport to be reporting what was said on that privileged occasion.

The case, therefore, resolves itself into a question of damages.

Now, the damages have been assessed at a very high figure. The grounds which render the Courts in England reluctant to interfere on the question of damages in a case tried before a jury do not exist in this country.

The reasons which influence a jury in assessing the damages do not appear; but in this country the reasons which have influenced the learned Judge in assessing damages appear in the judgment, and therefore are as open to be dealt with by the Court of Appeal as any other portion of the judgment. The plea of justification being withdrawn, it was not open to the defendant to give evidence to prove the truth of the libel, nor was he entitled to put the plaintiff facts in cross-examination, which, if admitted, would have established a plea of justification. But the gist of the action is the damage to the plaintiff's character: the defendant, therefore, was quite entitled to cross-examine the plaintiff to show that he was a person whose reputation would not be damaged by this particular libel.

The particular libel contained the imputation of an offence of a political nature, *viz.*, one under Chapter VI of the Indian Penal Code dealing with offences against the State, and in estimating the injury done to the plaintiff's reputation—and this is the gist of the action—the position which the plaintiff had adopted towards the State must be taken into consideration.

For example, a man who had been conspicuous in his efforts to allay disaffection, to preserve peace and order, and to promote contentment amongst the people, would be entitled, in my opinion, to far heavier damages for a libel imputing to him the commission of offences under sections 131 and 124A of the Indian Penal Code, than would a man who had avowedly mixed himself up with movements calculated to excite disaffection and hostility against the State. The libel in the former case would contain a far heavier imputation against the moral character of the person defamed than it would in the latter.

It appears on the record that the plaintiff was a prominent politician : that at a time of political unrest he appeared at a public meeting at Lyallpur, which was got up by those who were agitating against the Punjab Lands Bill. On his arrival, Ajit Singh was addressing a crowd : this was irregular, because no chairman had been elected ; his speech was stopped, a chairman was elected and the meeting proceeded. Ajit Singh spoke again using "strong words." The plaintiff spoke, twice opposing the Canal Colonization Bill, to an audience amongst whom there were retired sepoy and retired military men. The Punjab Army is recruited to some extent from the peasantry of the district in which the meeting was held. The plaintiff showed to the people at the meeting that the Government were changing by legislation the agreements made with the people to the detriment of the latter. These meetings, the plaintiff says, would inflame the minds of the people : and he says the people in the Punjab were very angry.

The plaintiff was a man of considerable influence in the Punjab. He was one of the prominent men. As such he took part in a meeting calculated to inflame the minds of the people against the Government. Seven weeks after that meeting he was deported under a Regulation empowering the Government to take that step for the purpose of preserving a portion of His Majesty's dominions from internal commotion.

In my opinion these matters ought to have been taken into consideration in assessing the damages : the fact of the

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deportation alone, if there were no other evidence of any sort, probably would not weigh heavily in reduction of damages, but it must not be looked at alone, but in conjunction with the events which have preceded it.

In my view, the damage done to the reputation of a person who has taken a prominent part in inflaming the minds of the people against the Government by a libel imputing an offence against the State must be estimated on a far lower basis than that done to the reputation of a person who has not taken up such a position.

Had the plaintiff used the influence which he undoubtedly possessed for the purpose of promoting peace and contentment, I should have agreed that he was entitled to very heavy damages for a libel imputing to him an attempt by underhand means to injure that which he professed to support. He thought proper, however, to throw his influence on the side of those whose object was to inflame the minds of the people, and is deported for the purpose of preserving the peace of the country.

The injury, therefore, to his reputation by the imputation contained in the defendant's libel is far less than it would have been had he professed to use his influence for the purpose of allaying rather than promoting discontent.

But while I think that the damages have been assessed on far too high a scale, I do not agree with the appellants that contemptuous or merely nominal damages should be given.

The defendants placed on the record a plea of justification : that plea was only withdrawn at the hearing. The circumstance that a defendant has continued to assert the truth of that which he is unable to prove has always been regarded as a matter in aggravation of damages. This alone is an answer to the appellants' contention that only nominal damages should be given.

I do not think the evidence warrants a finding that the defendants were actuated by personal spite against the plaintiff as an individual : on the contrary, I think they desired to express the views of that section of the community which was

of opinion that the release of the plaintiff would be a danger. In support of those views they have published an article, marked by vulgarity and bad taste, containing libellous statement, to the effect that the plaintiff has committed a criminal offence against the State. On the other hand, it has been shown that at a time of political unrest the plaintiff was taking a prominent part in a proceeding calculated to inflame people against the State, and that he was deported shortly after this proceeding.

What has been shown would have entitled the defendants to express an opinion that it would be dangerous to release the plaintiff, but though it gives ground for expression of opinion, it does not justify the misstatement of fact. But the circumstance that facts have been elicited giving ground for an expression of opinion against the release of the plaintiff ought to have been taken into consideration.

In my view, under these circumstances the damages to be assessed must be substantial, but not immoderate. The amount, therefore, I would award would be the equivalent of £100 of English money (Rs. 1,500). The decree of the Court of first instance must be varied by reducing the damage to Rs. 1,500.

With regard to the costs, the respondent has been successful on all points, save that of the quantum of damages. That being so, in my opinion he should have the costs of the appeal.

WOODROFFE J. The conclusion at which I have also arrived is that the defendants have failed to justify in law the statements they have made of the plaintiff; and that, having libelled him, they must pay damages; but that the evidence discloses circumstances which do not justify the award of the very large sum which the decree of Mr. Justice Fletcher has given him.

According to that evidence the plaintiff is a leading Indian politician. About March 1907 he took an active part in an agitation against the proposed Canal Colonization Bill, which affected a class from which the Punjab sepoys are drawn, as also colonist military pensioners. He says that the people were very angry and greatly excited: and in a memorial which

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he helped to prepare, it was alleged that the proposed Bill had created panic and commotion throughout the Punjab, and that it was calculated to shake the confidence of the loyal peasant in the justice and benevolence of Government. There was generally then a state of affairs which is currently called "political unrest." The plaintiff and a man, named Ajit Singh, who was subsequently deported, took apparently a leading part in the agitation against the Bill, though the plaintiff denies that in such agitation he was associated with Ajit Singh. The plaintiff, however, appeared at least on one occasion at Lyallpur on the same platform as Ajit Singh, though he says he did not know he was going to speak. "Strong words," he says, "were used by Ajit Singh," though apparently without any objection from him. Various other further meetings were held besides that at Lyallpur. Retired sepoys, he says, attended these meetings. But he states that at Lyallpur he did not see any officers or men in active military service "or at any other meeting in any political way." These meetings, he admits, would inflame the mind of those who attended them. He denies, however, that he was guilty of sedition or of tampering with the loyalty of the sepoy; and it is suggested on his behalf that he was merely doing what he was entitled to do in agitating constitutionally against an unpopular and unwise measure. It has, however, been alleged by the Secretary of State for India that the agitation in which the plaintiff was engaged was not merely an agrarian movement provoked by the proposed Bill, but a general political movement in which there was a deliberate heating of the political atmosphere preparatory to the agrarian meeting at Rawalpindi, which gave rise to the disorders in the Punjab: in other words, that the Colonization Bill was, with other things, merely fuel for an agitation on wider lines and for other purposes. The argument on behalf of the respondent has seemed to assume that his action was limited to one single appearance at Lyallpur. It is more reasonable, however, to suppose that the respondent as a political agitator, was agitating; nor does his evidence suggest to me this very limited view of the part taken by him in the agitation. He

admittedly met certain political associations ; shaped the memorial ; and might (he says) have attended another meeting besides that at Lyallpur. As one might have expected, he adds that he has at one time or another contributed to papers and criticised in print and speech, and has doubtless busied himself in many other ways in the extensive sphere of public movements,—political, social and educational,—in which he states he is interested.

On the 9th May 1907, quite shortly after and following on this agitation, the plaintiff was arrested and deported under the provisions of Regulation III of 1818 as extended to the Punjab by Act IV, 1872. This Regulation provides that the Governor-General may place an individual under restraint as a State prisoner when the reasons stated in the preamble seem to him to require it. The reasons of State there set out embrace amongst others the security of the British dominions from internal commotion ; and this may be done even where there is ground for judicial proceedings, when such proceedings are not adapted to the nature of the case, or may for other reasons be unadvisable or improper.

The learned Judge has held that this fact should not be taken into consideration in any way, and we have been urged in appeal to close our eyes to what is perhaps the most outstanding and wide-known event in the political career of the plaintiff, who complains of libellous statements with respect to his conduct in such career. This event obviously throws light on the character of his agitation previous thereto. It may certainly be affirmed that (subject to certain well-known limitations), what has probative force is evidence. Were this not so, the law of evidence would lie in deserved discredit. Then is there any rule of law to be implied either (as the learned Judge has done) from the terms of the Regulation itself, or in the Evidence Act, which excludes this fact from our consideration ? I am, with all respect, unable to agree with the opinion of Mr. Justice Fletcher that the framers of the Regulation intended to exclude altogether the consideration of fact of the deportation in such a case as this. I find great difficulty

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in believing that they ever had in mind circumstances which have arisen now and for the first and only time during the period of nearly a century which has elapsed since the date of the Regulation. It is safer to assume that had they had any particular intention in this matter they would have expressed it, which they have not. Nor do the other circumstances to which the learned Judge refers justify the exclusion of this evidence. It is not the case that neither the public nor the plaintiff knew the reasons for the deportation. They have been published by the Secretary of State, who has, amongst other things, stated that the plaintiff was arrested "for the active promotion of open sedition" (Debate 13th May 1907). The statement in Hansard was read by the plaintiff in the *Journal India*. The plaintiff was, therefore, not debarred from showing that the published reasons were ill-founded; and in fact he has attempted to do so, as for instance in the case of the serious allegation of the preaching of disaffection to soldiers in active service at Ferozepore. No doubt all the details of the circumstances which, in the opinion of Government, justified its action have not, for reasons of State, been disclosed. But if the plaintiff had proved to the satisfaction of the Court by independent reliable evidence that there was no foundation in the published allegations, it would be time then to consider whether the deportation as induced by any undisclosed ground could fairly be used against him. This case does not arise.

In my opinion, therefore, there is nothing in the Regulation itself which excludes us from considering the deportation in this case; nor am I aware of any provisions in the Law of Evidence which excludes it. No doubt there are circumstances connected with this executive order which go to the weight which should be given to it. There is the possibility of error which is not unknown even in judicial proceedings conducted with every regularity in the presence of the party himself; and certainly such possibility is not diminished by the fact that these executive proceedings were taken *ex parte* against the plaintiff. On the other hand, and as against this, it must

be remembered that these proceedings are of a very exceptional and stringent character, and it is reasonable, therefore, to assume (as I do) the exercise of more than ordinary care and caution before a reluctant recourse was had to them. The circumstance that the executive order was *ex parte* might have required further emphasis had the question before us been one of mulcting the plaintiff; but that is not the case here, where the party against whom it is used is himself seeking a decree for damages against the defendant. The fact of the deportation is, however, not inadmissible merely because the order which is its authority was passed *ex parte*. To use the example cited by the Advocate-General, upon an issue of lunacy, the fact that a person had been at some past time placed (otherwise than under the direction of the Court) in detention as a lunatic would be some evidence upon the question of his soundness of mind, notwithstanding that he was no consenting party to such detention, and may indeed (madly as it may have appeared to some and sanely to others) have protested against it. Other examples may be given. Upon the issue whether a person behaved improperly at a meeting, the fact that he was turned out upon such an allegation, even though he was not heard in answer to it, would be evidence; and that circumstance, combined with others, including the reputable and responsible character of the people who took this action, might form the basis of an inference that the alleged ground upon which he was turned out in fact existed. I am of opinion, therefore, that if the fact of deportation helps to explain the character of the political agitation in which the plaintiff admits that he was engaged, it should be considered. For, it is to be remembered, that in this case the deportation (for which reasons have been assigned) does not stand alone, but in relation to the other admitted facts of the case which, in their turn, serve to explain it. I desire, therefore, to be understood as confining my remarks to the admissibility of the evidence under the circumstances here disclosed. But it has been said that the fact of the plaintiff's deportation does not serve to elucidate his antecedent conduct, because it is alleged we do not know the

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reasons for such deportation. This is, however, not so, except in the sense that the whole of the circumstances which prompted the executive order have not been disclosed. We, however, know quite enough for the purposes of this case. Apart from any statement made by the Secretary of State, we know, from the preamble of the Regulation, that the plaintiff's arrest must have been ordered, because his conduct appeared to render his removal necessary to secure the British Dominions from internal commotion. But the matter does not rest there; for the Secretary of State for India has on various occasions stated, in answer to questions which took exception to the deportation, the reasons which induced the Government to take this action. These statements are obviously not in themselves alone evidence of the existence of the facts spoken to; but they are evidence—and the best evidence—of the reasons alleged as the cause and justification of the action of Government, which is a totally different matter. If the fact of deportation can be considered, then the grounds of the Government's action are as much evidence as the action itself of which they are the alleged cause. The Secretary of State, whilst affirming his inability to say for what, if any, crime the plaintiff was arrested and deported, and refusing certain information which it was against the public interest to disclose, said (I summarise and abbreviate) as follows. The conditions affecting the Colonisation Act, which was not the main cause of disturbance in the Punjab, were greatly misrepresented. Of 28 meetings held by the leading agitators in the Punjab, 5 only related, even ostensibly, to agricultural grievances. The remaining 23 were all purely political. The plaintiff took part in two of these meetings, of which one related to the Bill and the other was political. Ajit Singh took part in 13, of which 11 were political. It was not the case that there was no connection between the plaintiff and Ajit Singh. The Secretary of State had himself read public utterances of the plaintiff which were strongly of the nature of ante-British propaganda. The report of his speech quoted in the *Wajadar*, and of his speech at Lyallpur reported in the *Punjabi*, contained language which

were not within the limits of constitutional agitation, but they were not the only grounds or information for resort to the Regulation under which he was deported. It was not the case that the movement in the Punjab was agrarian only and not political. It appeared, on the contrary, that there was a deliberate heating of the political atmosphere preparatory to the agrarian meeting at Rawalpindi. The plaintiff's action constituted him a danger to the State, and he had been arrested not for any legitimate agitation against any reasonable grievance, but for the active promotion of open sedition. The Secretary of State further informed Parliament that the plaintiff had been informed that the reason of his arrest and deportation was to preserve a portion of His Majesty's dominions from internal commotion, but that the plaintiff denied that he had ever done anything to cause such commotion. These statements, whether accurate as to their subject-matter or not, are evidence to show the grounds alleged by the Government as those upon which the plaintiff was arrested and deported. What then is the effect of such deportation? The legal presumption of regularity applies to official as well as to judicial proceedings, and it operates in the present case to this extent that, in the absence of evidence to the contrary, it must be assumed that to the mind of Government the state of affairs appeared to be such as to justify the plaintiff's arrest and deportation. It may well be that in some particulars the plaintiff's conduct has been more severely judged than should have been the case. It is possible that in others he may have suffered from false reports. It would, however, be ridiculous to hold that this appearance was in fact wholly illusory, and that the plaintiff's action had been misobserved and misrepresented throughout. On the contrary, I am satisfied that the Government would not have taken this exceptional action against the plaintiff unless, after the most careful consideration, his conduct appeared to justify it. We have it then on the plaintiff's evidence that he was engaged in a political agitation which ended in the order for his arrest and deportation; and that this order was issued because the plaintiff's agitation

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appeared to the Government to be such as to require measures to be taken for the security of the country from internal commotion. There is a legal presumption that the action taken appeared to the Government to be necessary; and it is unreasonable to suppose that this would so have appeared had the plaintiff's action been in fact of an entirely legal and legitimate character and free from blame as he asserts. The conclusion, therefore, at which I arrive is (to put the matter in the most favourable form for the plaintiff) that his conduct did in fact go so far beyond the limits of legitimate constitutional agitation as to justify action under the Regulation being taken against him. I am unable, therefore, to accept the plaintiff's statement that in the agitation (which he admits) he was in no way to blame and gave no ground for the action taken against him. It is not necessary to hold—and I do not say that the plaintiff has said what he knows to be false in this matter—a conclusion which would be inconsistent with the personal character which has admittedly been given to him. It is possible that he may have believed, and still believes, that he did not exceed the bounds of legality. He may, however, not be the best judge in this matter. If, as I think, there is reason to believe that the plaintiff's conduct was, from a political point of view, blameworthy, then he is not entitled to damages such as he has been awarded on the footing that he has been free from all blame. But this is a different thing from holding (as we have been asked to do) that the facts and circumstances to which I have referred prove that the plaintiff tampered with the loyalty of the sepoy, so as to render him (in my reading of the libel) liable to a charge under section 131 of the Penal Code. In my opinion these facts do not justify this inference for two reasons:—Firstly, looking at the Regulation by itself, it cannot be inferred from the general circumstance that the plaintiff's action threatened the tranquillity of the country, that that action was of the particular kind charged; and next, looking at the Regulation, together with the grounds of the deportation assigned by Government, I can find none from which, either by itself or in conjunction with the

other facts of the case, I should be justified in holding (contrary to the oath of the plaintiff) that he had in fact tampered with the loyalty of the sepoys.

The deportation of the plaintiff was the subject of discussion in Parliament. Questions were asked of the Secretary of State for India, and these and his answers thereto and the statements of other members have been relied on by the defendants upon the issue of comment on a matter of public interest. They have, however, been objected to on two grounds. The first is that of want of proof, it being argued that the reports in "Hansard" may not be referred to in order to ascertain what has been said in Parliament. It has, however, not been suggested that the statements were not made, or that they have not been accurately reported. Several of these statements were put to the plaintiff during cross-examination. Reliance has been placed on the decision in *McCarthy v. Kennedy* (1). That report is so meagre that it is not quite clear what was decided, but in any case the matter must be decided with reference to the provisions of the Evidence Act. Though section 57 does, I think, aid the appellants, the penultimate paragraph does not bear the construction which they have put on it. That paragraph does not say whether the Court may or may not take notice of any fact. Still less does it say or mean that the Court shall or may take judicial notice of every matter which comes under the heads of description there given. It provides that when the Court does take judicial notice of the facts of which it is bound to take notice under clauses 1 to 13, then it may refer to appropriate books of reference as to those facts. Speeches made in Parliament do not come within those clauses, for the "course of proceeding" referred to in clause (4) is a different matter. This phrase does not refer to what was in fact done on any particular occasion, but to the general rules of procedure. But the section also adds (and in this it goes beyond English Law) that in all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books of reference. This

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(1) (1905) The "Times," 4th March.

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is doubtless a provision primarily for the benefit of the Court, and I agree with my learned brother that the section does not absolve the party from proof of any fact which does not fall within the provisions of clauses 1 to 13. Facts, however, of which judicial notice may be taken are not limited to those of the nature specifically mentioned in these clauses. These are mentioned because, as regards them, the Court is given no discretion. As to others, the Court must determine in each case whether the fact is of such a well known and established character as to be the proper subject of judicial notice. A matter of public history may be such a fact. The tendency of modern practice is to enlarge the field of judicial notice: and the importance of the penultimate paragraph to my mind is this—that it indicates both an approval of this principle as also the kind of subjects of which (in application of such principle) judicial notice may be taken. The Indian case law and practice appear to me to have also proceeded on a liberal application of the power to take judicial notice. In the present case (for I am only concerned with that) the fact that there has been a political agitation in this country, that the plaintiff and others have been deported in consequence of the part said to have been taken by them in it, and that such agitation, conduct and deportation were the subject of debates in Parliament and in a general way what was said in such debates and therefore became widely known as to the alleged cause of such deportation, appear to me to be matter of public history and of such notoriety that it is reasonable to assume their existence without formal proof. The fact that they are recent does not affect their character of notoriety, which is the basis of judicial notice. I think we may assume these facts in the present case with a greater sense of certainty, seeing that their existence has never been disputed, nor has the accuracy of the report in "Hansard" of these facts (so far as they occurred in Parliament) been put in issue. I am of opinion, therefore, that we may take judicial notice of the fact that there were debates in Parliament in which the subject of the plaintiff's conduct and deportation were discussed, and

which debates were themselves the subject of widespread comment.

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Then, is Hansard an appropriate book of reference for the purpose (to use the words of the section) of enabling us to take judicial notice of the facts which we have been called upon to do? If it be not, I do not know of any other more appropriate. "Hansard" is itself almost a public institution. The first volume of its new series commenced in the year 1831 and was a continuation of the Parliamentary history to which reference seems to have been made in *Damodar Gordhan v. Deoram Kanji* (1) with respect to speeches by Lord Thurlow and Lord Palmerstone. It is in short the established report of Parliamentary debates, and I believe it is the fact that in order to ensure accuracy the reports of speeches are submitted to members for their approval before publication. The learned Judge, therefore, in my opinion rightly, in the circumstances of the present case, permitted reference to Hansard in the Court below.

It is next argued that, assuming that the statements are properly before the Court, they are not relevant. In my opinion they are. I have shown one instance of this in the case of the published reasons for the deportation. They are further relevant on the issue of comment, and were, I understand, on this ground referred to. It may be that the defendant may fail upon that issue, but that can only be determined after the admission and consideration of the matter upon which his plea is made to rest. I have already referred to several of the statements of the Secretary of State. I here mention that on which the most stress has been laid in justification of the libel. It is to be found at page 42 of the paper book, where the Secretary of State gives out merely as a report based on the statement of an Indian Governor that the plaintiff was a revolutionary, who, though his private character appeared to be above approach, was actuated by the most intense hatred of the British Government, and had, "whilst keeping himself in the background, engineered the systematic propagandism

(1) (1876) I. L. R. 1 Bom. 367, 380, 386.

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of the last few months. He added—"In this agitation special attention, it is stated, had been paid to the Sikhs, and in the case of Lyallpur to the military pensioners." It was further reported that at Ferozepur disaffection was openly preached, men of the Sikh regiments having been invited to attend, and several hundreds of them having in fact acted upon the invitation. If it was intended to affirm, as beyond doubt, the plaintiff's personal responsibility in respect of all the reported incidents of this agitation, the statement would have been obviously different both as to form and substance. It is consistent with this statement that the plaintiff, while taking a leading part in the agitation, was not in fact personally responsible for every incident which occurred in it. As to these charges the plaintiff, after a general denial that he tampered with the loyalty of the sepoys, swears as follows:—"It was said in one extract (from Hansard) that leaflets were distributed at Ferozepur meeting, but I know of no such leaflets and I know of no meeting of this description held at Ferozepur." Some of the non-official members of Parliament expressed their belief in the innocence of the plaintiff, who was described by them variously as an ordinary land reformer, a moral teacher, a successful lawyer and man of property, who had, unlike Ajit Singh, never identified himself with violent schemes or seditious movements.

The article in suit was preceded by several others abusive of the plaintiff published by the defendants. The plaintiff admittedly enjoys a high private character and has never been detained otherwise than as a State prisoner under the Regulation. It was, therefore, not from a desire to be scrupulously fair that the defendants among other offensive allusions to the plaintiff describe him in these articles as a "jail bird." I am at a loss to conceive how the Editor of a responsible paper could think that any public service, of which we have heard so much on behalf of the defendants in this case, could be rendered by such articles as these in allaying the situation with respect to which they were written, nor do I understand how the article in suit was passed for publication. On its face it

appears to be a piece of backstairs gossip relating to facts certainly obtained from unauthorized sources, and possibly by illegal means, though it is not necessary to suggest that the writer himself was privy to the illegality, if any. It asserts the truth of certain of its statements, notwithstanding official denials which are said, in an euphemistic phrase, to be falsehoods. In some respects this article has not been correctly read in the judgment under appeal. It is in the first place clear on a reading of it that the defendants' counsel could not have contended that all its statements were drawn from "Hansard." Secondly, the alleged official falsehoods do not refer to the matter of the libel. It is no doubt the case that no definite formal official charge has been made against the plaintiff in terms of the alleged libel. But there has been no public official denial of that fact. The statements which the writer asserted in spite of official denials refer to the alleged proposal and action of the Viceroy and the Commander-in-Chief. Thirdly, it is not the fact that the writer charged the Secretary of State with having concurred in the act of deportation solely because he dared not allow the then Commander-in-Chief to resign. The article makes it plain that according to the writer's alleged information both the Commander-in-Chief and the Viceroy were agreed upon the subject of the deportation of the plaintiff, and that the alleged difference between them was as to the advisability of vetoing the Canal Colonies Bill—a matter which does not affect the subject before us. Lastly, that the writer had in contemplation, in parts of his article, the debates in Parliament, is shown by the references thereto contained in the article itself. The question of the release of the plaintiff was a question of public interest on which the defendants or any one else might fairly comment, and had the writer confined himself to citing the statements to which I have referred made by the Secretary of State himself, and saying that having regard to such statements it was unadvisable that the plaintiff should be released, the statement being [fair] comment would not have been open to question. Such comment would, however, have carried with it its own corrective,

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to be found in the proceedings on which it was based and to which the reader was referred. But I agree with Mr. Justice Fletcher that the writer did not do this. What he did was to assert as a fact the existence of certain military reports which have not been proved, and as to which, for all we know, the writer may have been misinformed; and then, on the information which he suggests he had received from these and possibly other secret sources, makes two statements of fact of his own for the truth of which he personally vouches: *firstly*, that these military reports stated that the plaintiff and Ajit Singh were the principal agitators, who were using the provisions of the Canal Colonies Bill to inflame the sepoys against the Government; and, *secondly*, that there was no possibility of doubt but that the plaintiff had been guilty of tampering with the loyalty of the Punjab sepoy. Whether the writer had, or the reader would have, the Penal Code in mind, the tenor of the whole article shows that the plaintiff was charged with having done acts in the nature of those dealt with by section 131 of the Penal Code. These allegations are not made by way of comment on the debates in Parliament, but as the writer's own statements of fact; and, next, the statements in Hansard fall short of those in the defendant's article. I have already dealt with the character of the statement in Parliament at page 42 of the paper book. It is further significant that throughout the debates a tone of greater certainty prevails as regards the part taken by Ajit Singh as appears, amongst others, from the statement at page 41 of a former Indian Official that "the two agitators who had been deported had gone about the country tampering with the loyalty of the people and (in the case of Ajit Singh at least) with the loyalty of the troops." Neither then the evidence, nor the statements in Parliament, nor the deportation (for those statements do not assert that tampering with the loyalty of the sepoy was its ground) warrant as comment the libellous statement complained of. Indeed it has not been seriously contested that the actual statements in the article are not to be found in the debates on which it is alleged comment was made. It has, however, been

contended, contrary to the statement of the law in *Merivale v. Carson* (1) and *Peter Walker & Son v. Hodgson* (2), that fair comment is a branch of the law of privileged occasion and that "licentious" comment will pass, provided that there is no express malice. I am clearly of opinion, however, that this is not so. The law may shortly be stated to be that fair comment on a matter of public interest is no libel. But for a comment there must be a text which must be accurately stated. Comment must appear as comment, and must not be mixed up with the facts. If a person misstates any of the facts on which he comments, this misstatement, however *bonâ fide*, negatives the possibility of the comment being fair. A statement of fact as distinguished from comment is not protected. Then are the facts true? The statements being in themselves defamatory are presumed in law to be untrue until the contrary be shown. A great deal of discussion has taken place with reference to what occurred in the lower Court on the question of the withdrawal of the plea of justification. It is to be regretted that issues (which the Code directs all Courts including the High Court to frame) were not settled, in which case probably there would have been less room for discussion. According to the Minute Book of 28th June 1909, Mr. Norton, who appeared for the defendants, stated as follows: "I withdraw paragraph 5 in so far as I will not attempt to prove my plea amounts to a plea of justification, I do not justify here." Apparently learned counsel, in answer to an enquiry of the Court, desired to intimate that he would not call evidence to justify the statements complained of, but did not withdraw the plea in the sense that he admitted the defendants' statements to be false and thus abandoned his right to cross-examine the plaintiff with a view to show that the statements were justified, or to contend, when the evidence was all in, either that the statements were true and the comment was thus fair, or that there was such amount of truth in the charges made against the plaintiff as should go to the mitigation of damages. While this may have a bearing on the question as to how far

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(1) (1887) 20 Q. B. D. 275, 282.

(2) [1909] 1 K. B. 239.

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facts which fall short of justification may affect a mitigation of damage, it is none the less the case that the defendants have not proved their allegation that the plaintiff did in fact tamper with the loyalty of the Punjab sepoy, and they have in consequence libelled the plaintiff. The defendants must, therefore, pay damages to him. He asked for half a lakh of rupees and has been awarded Rs. 15,000. At the outset, I desire to say that in my opinion the English cases which deal with the question of the revision of damages by the Court of Appeal have no application in this country where the Jury system, with respect to which the English decisions have been given, does not prevail. Here, the Court acts as both Judge and Jury, whether sitting as Court of first instance or appeal : though in appeal it will not, of course, in this or in any other matter, interfere, unless the decision appealed against appears to it to be clearly erroneous. It has been pressed upon us that we should not do so, because it is said the Court of first instance was better situated than ourselves to assess the damages. I am unable to discover any ground for this argument, which has application only in cases of appreciation of oral testimony. Before affirming this decision, we should be satisfied that the plaintiff has in fact suffered damages to the extent of Rs. 15,000 or some like sum. I am wholly unable to bring myself to this conclusion.

In the first place, the learned Judge has, in assessing the damages, proceeded as though no question arose as to the political character of the plaintiff who seeks damages in respect of the injury to such character. I say "such character," for assuming that the plaintiff was charged with an offence, that offence was of a political nature. Under section 55 of the Evidence Act, the fact that a person's reputation is such as to affect the damages he should receive is relevant. In this country reputation includes both character and disposition. And disposition is obviously not the less proven, because it appears on the face of the facts deposed to by the plaintiff himself (including in the present case his deportation) or is a proper inference from these facts. I have already dealt both with

such facts and inferences. Next, under the circumstances of this case, it appears to me to be highly probable that, assuming the political reputation of the plaintiff to have suffered damage, such damage is to be attributed in greater degree to the deportation of the plaintiff and the public and widely spread statements concerning the plaintiff made by the responsible executive Officers of Government than to the utterance of an anonymous and irresponsible contributor to the defendants' journal. In any case it would be difficult in assessing damage to discriminate how much was due to these last-mentioned statements and how much was due to the more pronounced and more defamatory statement of the defendants. Further, the plaintiff himself states that he cannot say if he has suffered by reason of this libel. No doubt general damages need not be proved, but will be assumed on proof of the libel. This means that something, even though it be nominal damages, must be given on such proof. It does not mean that the plaintiff is to be given a very large sum of money without any regard to what the evidence discloses or fails to disclose. Here, with two exceptions to which I will next allude, that evidence fails to indicate any pecuniary, professional, or social loss in consequence of the alleged libel. The plaintiff says that it has been reported to him that "those people who mix with British officials and some Europeans now think worse of me since these publications;" and, secondly, "that the conservative Press showed that they disliked me more." It is not improbable that the plaintiff has attributed to the irresponsible utterances of the defendants' correspondent—a result which should more properly be assigned to the action of Government in ordering his deportation, and to the accredited and responsible statements of its officials in justification of it. Notwithstanding, however, all this, it is quite possible, having regard to the fact that the plaintiff's definite charge was in its possible consequences more injurious than any previously made against him, and was asserted as a matter beyond doubt that the plaintiff has in fact suffered as a strict result of the libel more than the merely nominal damages which it has been suggested,

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in last resort, should be awarded. I concur, therefore, in the order which my learned brother proposes to make as to the disposal of this appeal. I wish, however, to add a word as to the costs. Not merely have the defendants rendered themselves liable to costs by reason of their failure to establish their contention that they had not libelled the plaintiff, and that the suit should in consequence be dismissed, but they do not appear to me to be deserving of further relief in this matter over and above reduction of damages, having regard to the character of the previous articles which they published of the defendant and their conduct in respect of that in suit in publishing a statement which, on the face of it, purported to come from an unauthorised source without attempting previously to ascertain its truth and in failing subsequently to justify it.

S. A. A. A.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff

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Mortgage—Order absolute, application for—Foreclosure—Limitation—Execution of decree, application for—Revival of pending execution—Limitation Act (IX of 1908) Sch. II, Art. 181.

Previous to the passing of the Limitation Act (IX of 1908) and the Civil Procedure Code (V of 1908), there was no rule of limitation applicable to an application for order absolute of a decree *nisi* made under section 86 of the Transfer of Property Act (IV of 1882).

Tiluck Singh v. Parsotein Proshad (1), *Rahmat Karim v. Abdul Karim* (2) referred to.

An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless, or has been suspended by reason of an injunction or like obstruction.

*Appeal from Original Decree, No. 114 of 1910, against the decree of Pramatha Nath Chatterjee, Subordinate Judge of 24-Parganas, dated March 5, 1910.

(1) (1895) I. L. R. 22 Calc. 924.

(2) (1907) I. L. R. 34 Calc. 672.

Qamaruddin Ahmad v. Jawahir Lal (1), *Rudra Narain Guria v. Pachu Maity* (2), *Narayan Govind Manik v. Sono Sadashiv* (3), *Rahim Ali Khan v. Phil Chand* (4), *Mir Ajmuddin v. Mathura Das* (5), *Suppa Reddiar v. Avudai Ammal* (6), *Paras Ram v. Gardner* (7) referred to.

The Limitation Act (IX of 1908) does not profess to provide for all kinds of applications whatsoever.

Govind Chunder Goswami v. Rungunmoney (8), *Sital Prosad v. Abdul Rashid* (9) referred to.

Nor does it apply to an application to a Court to do what the Court has no discretion to refuse.

Kylasa Goundan v. Ramasami Ayyan (10), *Balaji v. Kushaba* (11) referred to.

Nor is it applicable to an application to the Court to terminate a pending proceeding, the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court.

Puran Chand v. Roy Radha Kishen (12) referred to.

Article 181, Sch. II of the Limitation Act (IX of 1908) does not govern an application for order absolute under order 34, rule 3 of the Civil Procedure Code (V of 1908).

APPEAL by the plaintiff, Madhabmani Dasi.

The plaintiffs Madhabmani Dasi and Amrita Nath Mitter, the administratrix and administrator of the estate of Dwarka Nath Mitter, instituted the suit to enforce a mortgage against Pamela Lambert the mortgagor, and the purchaser of the equity of redemption, and the two daughters of the mortgagor. The suit was decreed on the 30th of March 1904 against the mortgagor and her assignee, but was dismissed with costs against the mortgagor's daughters, and the usual direction for redemption within 6 months was given in the decree. The result was that there was a decree for foreclosure of the life interest of the mortgagor in favour of the representatives of the mortgagee, and there was also a decree for costs against the mortgagee in favour of the daughters of the mortgagor. On the 5th of March 1907, Amrita Nath Mitter obtained leave to withdraw the appeal which he had filed; thereupon the plaintiff, Madhabmani, the widow of the mortgagee, who was also the administratrix of the mortgagee's

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| (1) (1905) I. L. R. 27 All. 334; | (6) (1904) I. L. R. 28 Mad. 50. |
| L. R. 32 I. A. 102. | (7) (1877) I. L. R. 1 All. 355. |
| (2) (1896) I. L. R. 23 Calc. 437. | (8) (1880) I. L. R. 6 Calc. 60. |
| (3) (1899) I. L. R. 24 Bom. 345. | (9) (1908) 11 Oudh Cases 208. |
| (4) (1896) I. L. R. 18 All. 482. | (10) (1881) I. L. R. 4 Mad. 172. |
| (5) (1874) 11 Bom. H. C. 206. | (11) (1906) I. L. R. 30 Bom. 415. |
| (12) (1891) I. L. R. 19 Calc. 132. | |

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estate, applied for an order absolute on the basis of the decree *nisi* passed on the 30th of March 1904.

One Levinia Ashton, who was the aunt of the daughter of the mortgagor, and who had, at a sale in execution of the decree for costs awarded to the daughters of the mortgagor on the dismissal of the suit, purchased the decree *nisi* on the 11th of August 1904, the same having been confirmed on the 4th of November 1908, objected on the 19th December 1908 to the order absolute for foreclosure being made in favour of anybody else except herself, and applied for the substitution of her name as decree-holder and for an order absolute for foreclosure. The lower Court thereupon, on the 19th of December 1908, dismissed Madhabmani's application for order absolute. On the 23rd December 1908 Madhabmani, who had now become aware of the execution sale, applied for setting aside the sale on the ground of fraud and irregularities, and the sale was set aside on the 7th of July 1909, and the application of Levinia Ashton of the 21st of December 1908 for order absolute was also dismissed. On the 8th of July 1909 Madhabmani renewed her application as decree-holder for order absolute, but no orders were passed. Levinia Ashton, on the 13th of July 1909, appealed against the order setting aside the sale, and her appeal was, on the 2nd of February 1910, dismissed. On the 10th of February 1910, Madhabmani made an application that her application of the 8th of July 1909 might be adjudicated upon, and an order absolute for foreclosure made; but the judgment-debtors intervened on the ground of limitation, and on the 5th of March 1910 the Subordinate Judge allowed the objection to prevail. Against that order the plaintiff appealed to the High Court.

Babu Ram Chandra Mazumdar and Babu Karunamoy Bose, for the appellant. The application of the decree-holder of the 8th of July 1909 and the 10th February 1910 ought to be treated in substance as an application for revival or continuation of the original application for an order absolute of the 9th of September 1908 : *Qamaruddin Ahmad v. Jawahir Lal* (1),

Rudra Narain Guria v. Pachu Maity (1), *Suppa Reddiar v. Avudai Ammal* (2), *Narayan Govind Manik v. Sono Sadashiv* (3).

That even if the application of the 8th July 1909 or the 10th of February 1910 be treated as an independent application for order absolute, it is not open to objection on the ground of limitation, inasmuch as Article 181, Schedule II of the Limitation Act (IX of 1908) does not apply to pending proceedings : *Kedar Nath Dutt v. Harra Chand Dutt* (4), *Dwarka Nath Misser v. Barinda Nath Misser* (5), *Shah Muhammad Khan v. Hanwant Singh* (6), *Latchmanan Chetty v. Ramanathan Chetty* (7), *Puran Chand v. Roy Radha Kishen* (8), *Narayan Govind Manik v. Sono Sadashiv* (3), *Muhummad Umarjan Khan v. Zinat Begum* (9), *Waliya Bibi v. Nazar Hasan* (10).

The present application for an order absolute is like an application in a pending proceeding : *Tiluck Singh v. Parsotein Proshad* (11), *Kedar Nath Dutt v. Harra Chand Dutt* (4), *Chalavadi Kotiah v. Paloori Alimallammah* (12), and is not a proceeding in execution : *Ajudhia Parshad v. Baldeo Singh* (13), *Akikunnissa Bibee v. Roop Lal Dass* (14). And Article 178 of the Limitation Act is not applicable to an application under section 89 : *Tiluck Singh v. Parsotein Proshad* (11), *Ranbir Singh v. Drigpal* (15); and same construction will be put on statute *pâri materia* : *Murray v. East India Company* (16), *Tolson v. Kaye* (17).

Preamble to the Limitation Act shows that Article 181 does not apply to all applications. Nor will it have any retrospective operation if that lead to the prejudice of the parties : *Delhi and London Bank Limited v. Orchard* (18), *In the matter of the petition of Ratansi Kalianji* (19); or where compliance with

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| (1) (1896) I. L. R. 23 Calc. 437. | (11) (1895) I. L. R. 22 Calc. 924. |
| (2) (1904) I. L. R. 28 Mad. 50. | (12) (1907) I. L. R. 31 Mad. 71. |
| (3) (1899) I. L. R. 24 Bom. 345. | (13) (1894) I. L. R. 21 Calc. 818. |
| (4) (1882) I. L. R. 8 Calc. 420. | (14) (1897) I. L. R. 25 Calc. 133. |
| (5) (1895) I. L. R. 22 Calc. 425. | (15) (1893) I. L. R. 16 All. 23. |
| (6) (1898) I. L. R. 20 All. 311. | (16) (1821) 5 B. & Ald. 204. |
| (7) (1904) I. L. R. 28 Mad. 127. | (17) (1822) 3 B. & B. 217, 227. |
| (8) (1891) I. L. R. 19 Calc. 132. | (18) (1877) I. L. R. 3 Calc. 47; |
| (9) (1903) I. L. R. 25 All. 385. | L. R. 4 L. A. 127. |
| (10) (1904) I. L. R. 26 All. 623. | (19) (1877) I. L. R. 2 Bom. 148. |

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the new law has become impossible at the time when the new article came into operation: *Hickson v. Darlow* (1), *The Queen v. Wells* (2); see also Maxwell on Statutes, page 323, *et seq*; and General Clauses Act, section 6.

Babu Mahendra Nath Roy, Babu Mohini Mohan Chatterjee and Babu Shashi Shekhar Bose, for the respondent. The provisions of sections 86 and 87 of the Transfer of Property Act (IV of 1882) have been transferred to order 34, rules 2 and 3 of the Civil Procedure Code (V of 1908), which materially alters the law as it stood under the provisions of Article 178 of Act XV of 1877, which did not govern applications for order absolute: *Ajudhia Prashad v. Baldeo Singh* (3), *Akikunnissa Bibee v. Roop Lal Das* (4), *Wadia Gandhi and Co. v. Purshotam Sivji* (5), *Tiluck Singh v. Parsotein Prashad* (6), *Nagor v. Saudagar* (7); and, therefore, Article 181 of the present Limitation Act applies to applications for order absolute under order 34, rule 3 of the Civil Procedure Code: and the right to make an application of this sort accrues from day to day.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. The substantial question of law which calls for decision in this appeal is, whether an application for order absolute for foreclosure of a decree *nisi* in a mortgage suit, made in favour of the appellant on the 30th March 1904, is barred by limitation. The circumstances under which the question arises for decision are matters of record, and do not admit of any doubt or dispute. On the 30th September 1901, one Amrita Nath Mitter and his sister-in-law, Madhabmani Dasi, as administrators of the estate of Dwarka Nath Mitter, commenced an action to enforce a mortgage security against Pamela Lambert. They joined as parties defendants, the mortgagor and a purchaser of the equity of redemption, as also two daughters of the mortgagor, who, subject to the life-interest of their mother, had apparently a

(1) (1883) 23 Ch. D. 690.

(2) (1867) L. R. 2 Q. B. 542, 547.

(3) (1894) I. L. R. 21 Cal. 818.

(4) (1897) I. L. R. 25 Cal. 133.

(5) (1907) I. L. R. 32 Bom. 1.

(6) (1895) I. L. R. 22 Cal. 924.

(7) (1908) Punjab Rec. 57.

right of maintenance out of the estate of their father held by her. On the 30th March 1904, the suit was decreed against the first two defendants—the mortgagor and her assignee—and the usual directions for foreclosure of the life-interest of the mortgagor in the mortgaged premises were given, in the event of her failure to redeem the property within the 30th September 1904. The suit was, however, dismissed against the third and fourth defendants, the daughters of the mortgagor, and a decree was made in their favour for the costs of the litigation. The result was that there was a decree for foreclosure of the life-interest of the mortgagor in favour of the representatives of the mortgagee, and there was also a decree for costs against the latter in favour of the daughters of the mortgagor. An appeal was preferred against this decree by Amrita Nath Mitter, but on the 5th March 1907 the appellant obtained leave to withdraw the appeal. On the 9th September 1908 the other plaintiff, Madhabmani Dasi, who was not only the administratrix of the estate left by the mortgagee, but as his widow, was beneficially interested therein, applied for an order absolute for foreclosure on the basis of the decree *nisi*. Notices were directed to be issued, with the result that on the 19th December 1908 one Levinia Ashton, the aunt of the daughters of the mortgagor, appeared and objected that the decree *nisi* had been purchased by her at a sale in execution of the decree for costs held by the daughters of the mortgagor against the plaintiffs, representatives of the mortgagee, that such sale had been held on the 11th August 1908, and had been confirmed on the 4th November 1908, so that, as purchaser of the decree *nisi*, she alone was competent to apply for an order absolute for foreclosure. Madhabmani Dasi, thus apprised for the first time of the execution sale, applied, on the 23rd December 1908, for reversal of the sale on the ground that it had been brought about by fraud and was vitiated by grave irregularities. Levinia Ashton meanwhile, on the 19th and 21st December 1908, had applied for substitution of her name as decree-holder, and for order absolute for foreclosure on the basis of the decree purchased by her. In view of this application, the Subordinate

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Judge, on the 19th December, dismissed the application of Madhabmani for order absolute. On the 7th July 1909 the sale was set aside at the instance of Madhabmani, and the application of Levinia Ashton made on the 21st December 1908, for order absolute, was dismissed. On the day following, the 8th July 1909, Madhabmani Dasi as decree-holder applied for order absolute, but no orders were passed on her application. Levinia Ashton subsequently, on the 13th July 1909, appealed to this Court against the order of reversal of the sale. This appeal was dismissed and the order of the Court below was affirmed on the 2nd February 1910: *Levinia Ashton v. Madhabmani Dasi* (1). On the 10th February 1910, Madhabmani Dasi applied that her application of the 8th July 1909 might be taken into consideration, and an order absolute for foreclosure made in her favour. The judgment-debtors interposed the objection of limitation, and on the 5th March 1910 this objection was allowed by the Subordinate Judge. The decree-holder has now appealed to this Court, and on her behalf the decision of the Subordinate Judge has been assailed substantially on two grounds: namely, *first*, that the applications of the decree-holder made on the 8th July 1909 and 10th February 1910 should be treated in substance as applications for revival or continuation of the original application for order absolute made on the 9th September 1908; and, *secondly*, that, even if either of these two applications of 1909 and 1910 be treated as an independent application, it is not barred by limitation, as Article 181 of the second Schedule of the Limitation Act of 1908 does not govern applications in pending suits by which the Court is invited to make the final decree. It has further been suggested that the Limitation Act of 1908 has not retrospective operation so as to affect vested rights enjoyed by the appellant before the Act came into operation. In our opinion, the appellant is entitled to succeed on the first and second grounds urged on her behalf, and that in this view it is unnecessary to examine her third contention.

(1) (1909) 14 C. W. N. 560; 11 C. L. J. 489.

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In support of the first contention of the appellant, it has been argued that under the law as it stood before the Civil Procedure Code of 1908 and the Limitation Act of 1908 came into operation, there was no rule of limitation applicable to an application for order absolute of a decree *nisi* made under section 86 of the Transfer of Property Act. This position has not been, and cannot be, controverted on behalf of the respondent in view of the decision of this Court in *Tiluck Singh v. Parsotein Proshad* (1), which has been accepted as good law in *Rahmat Karim v. Abdul Karim* (2). It is manifest, therefore, that the application of the 9th September 1908 was not open to objection on the ground of limitation. It is contended, however, by the learned vakil for the respondent, that that application was properly dismissed, and the subsequent applications of the 8th July 1909 and 10th February 1910 are open to objection on the ground of limitation, as they were made after the Civil Procedure Code of 1908 had come into force, by which it is suggested a fundamental alteration was effected in the law. In answer to this contention, it has been urged by the learned vakil for the appellant that the applications of 1909 and 1910 should be treated in substance as applications for revival or continuation of the application of the 9th September 1908. In our opinion this contention is well-founded and must prevail. It is clear, as shown by subsequent events, that on the 9th September 1908 the decree-holder was competent to apply for order absolute. No doubt, by reason of a fraudulent execution sale, her title had vested in the auction purchaser; but when the sale was subsequently reversed, the parties were restored to the position which they would have occupied if the sale had never taken place. In other words, although the order of the 19th December 1908, by which the application of the appellant for an order absolute was dismissed was right when tested in the light of the facts then apparent on the record, the order was in substance erroneous as conclusively proved by subsequent events. To put the matter in another way, the Court would have acted prudently, and with

(1) (1895) I. L. R. 22 Calc. 924.

(2) (1907) I. L. R. 34 Calc. 672.

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the least chance of hardship to the petitioner, if the application had been adjourned so as to enable the petitioner to have the validity of the sale tested by an appropriate proceeding. In all such matters we must look more to the substance of the proceeding than to the mere form of it. In our opinion, the present case is within the principle recognised in numerous cases of high authority, that an application for execution of a decree may be treated as in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless, or has been suspended by reason of an injunction or like obstruction. In support of this view, reference may be made to the decision of the Judicial Committee in the case of *Qamaruddin Ahmad v. Jawahir Lal* (1) and to the cases of *Rudra Narain Guria v. Pachu Maity* (2), *Narayan Govind Manik v. Sono Sadashiv* (3) and *Rahim Ali Khan v. Phul Chand* (4). This view is really not inconsistent with that taken in *Mir Ajmuddin v. Mathura Das* (5), which was decided under the Limitation Act of 1859, and merely ruled that in computation of the time for execution of a decree, the period during which it has remained under attachment cannot be deducted. Reference may be made particularly to the case of *Suppa Reddiar v. Avu Dai Ammal* (6), which shows that a second application for execution may be treated as a continuation of the previous application, even though such application was formally dismissed as the result of an order adverse to the decree-holders in a claim case, and the consequent necessity for a suit by him which ultimately succeeded: see also *Paras Ram v. Gardner* (7). The present case is, from one point of view, much stronger than any to which reference has been made. Here, as soon as the application by the original decree-holder was dismissed, on the ground that her interest had passed by execution sale to Levinia Ashton, she forthwith applied for

(1) (1905) I. L. R. 27 All. 331;
L. R. 32 I. A. 102.

(2) (1896) I. L. R. 23 Cal. 439.

(3) (1899) I. L. R. 24 Bom. 345.

(4) (1896) I. L. R. 18 All. 482.

(5) (1874) 11 Bom. H. C. 206.

(6) (1904) I. L. R. 28 Mad. 50.

(7) (1877) I. L. R. 1 All. 355.

an order absolute; this remained pending till the disposal of the application for reversal of the sale, and as soon as that application succeeded, and her application for order absolute was dismissed, the original decree-holder again applied for order absolute. The result was that from the 9th September 1908 there has been before the Court, without any interruption, an application for order absolute by either the original decree-holder or by the purchaser of her interest at the execution sale. The Court did not await the result of the application for reversal of the sale, but dismissed the first application, and as soon as the sale was reversed, dismissed the second application by the purchaser, and entertained at the same time an application by the original decree-holder. The only reasonable view we can take of the proceedings under such circumstances, is that the application of the 10th February 1910 was in continuation of the application of the 8th July 1909, which was in substance for revival of the application of the 9th September 1908, which had been dismissed on the 19th December 1908. In this view, no question of limitation arises, and the Court below was clearly in error when it dismissed the application for order absolute as barred by limitation. It is not necessary, however, to rest our decision upon this ground alone, and we shall proceed to examine the second ground urged on behalf of the appellant.

The second ground urged on behalf of the appellant is that, even if the application of the 8th July 1909, or that of the 10th February 1910, be treated as an independent application for order absolute, it is not open to objection on the ground of limitation, because Article 181 of the second Schedule of the Limitation Act, even if it be assumed that the provisions of the Limitation Act of 1908 are applicable to a decree *nisi* made before the Act came into force, does not apply to an application of the character now before us. In answer to this contention, it has been argued by the learned vakil for the respondent, that the transfer of sections 86 and 87 of the Transfer of Property Act to the Civil Procedure Code of 1908 (order 34, rules 2 and 3) has effected a substantial alteration in the law in this

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respect, and that as one of the reasons given in cases decided under the former law, *Ajudhia Parshad v. Baldeo Singh* (1), *Akikunmissa Bibee v. Roop Lal* (2), *Wadia v. Purshotam* (3), *Tiluck Singh v. Parsotein Proshad* (4) and *Nagor v. Saudagor* (5), in support of the view that Article 178 of the Limitation Act of 1877 did not govern applications for order absolute, namely, that Article 178 did not apply to applications not made under the provisions of the Civil Procedure Code, has ceased to be applicable, it ought to be held that Article 181 of the Limitation Act of 1908 applies to applications for order absolute under order 34, rule 3, of the Civil Procedure Code of 1908. In our opinion, this argument is unsound and ought not to prevail. It may be conceded that Article 178 of the Limitation Act of 1877 did not apply to applications beyond the scope of the Civil Procedure Code, but it does not follow that that article, or the corresponding article of the Limitation Act of 1908, applies to all applications made in the course of a suit. It may be pointed out in the first place that the preamble to the Limitation Act of 1908 states expressly that the object of the Legislature was to consolidate and amend the law of limitation relating to only certain applications to Courts. In other words, the Limitation Act does not profess to provide for all kinds of applications to Courts whatsoever: *Govind Chunder Goswami v. Rungunmoney* (6), *Sital Prasad v. Abdul Rashit* (7). The Act certainly does not apply to applications to the Court to do what the Court has no discretion to refuse: *Kylasa Goundan v. Ramaswami Ayyan* (8), *Balaji Bin Khanduji Patil v. Kushaba Ramji Patil* (9); nor can the provisions of the Act be held to apply to an application to the Court to terminate a pending proceeding, the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court: *Puran Chand v. Roy Radha Kishen* (10). In cases of this class, it has been suggested that the right to make the application

(1) (1894) I. L. R. 21 Calc. 818.

(2) (1897) I. L. R. 25 Calc. 133.

(3) (1907) I. L. R. 32 Bom. 1.

(4) (1895) I. L. R. 22 Calc. 924.

(5) (1908) Punjab Rec. 57.

(6) (1880) I. L. R. 6 Calc. 60.

(7) (1908) 11 Oudh Cases 208.

(8) (1881) I. L. R. 4 Mad. 172.

(9) (1906) I. L. R. 30 Bom. 415.

(10) (1891) I. L. R. 19 Calc. 132.

may, indeed, be deemed to accrue from moment to moment ; if this view is adopted, any exception on the ground of limitation cannot obviously be supported : *Govind Chunder Goswami v. Rungunmoney* (1), *Kedar Nath Dutt v. Harra Chand Dutt* (2), *Ram Nath Bhattacharjee v. Uma Charan Sircar* (3), *Surendra Keshab Roy v. Khetter Krishto Mitter* (4), *Chala Vadi Kotiah v. Paloori Alimalammah* (5), *Rahmat Karim v. Abdul Karim* (6). In our opinion Article 181 of the Limitation Act of 1908 does not govern an application for order absolute under order 34, rule 3 of the Civil Procedure Code of 1908. In this view also the application made by the appellant for order absolute of the decree *nisi* is not barred by limitation.

As the appellant is entitled to succeed on the first and second grounds taken on her behalf, it is needless to examine the third ground which raises a question of considerable nicety about the retrospective operation of the Civil Procedure Code and Limitation Act of 1908, whether they affect rights created by mortgage decrees made under the Transfer of Property Act before the legislation of 1908 came into force : *Kounsilla v. Ishri Singh* (7).

The result, therefore, is that this appeal is allowed, the order of the Court below is discharged, and, as it is admitted that nothing has been paid to the decree-holder in satisfaction of the mortgage-decree, an order absolute for foreclosure is made in her favour. The appellant is entitled to her costs both here and in the Court below.

Appeal allowed.

S. A. A. A.

(1) (1880) I. L. R. 6 Calc. 60.

(2) (1882) I. L. R. 8 Calc. 420.

(3) (1899) 3 C. W. N. 756.

(4) (1903) I. L. R. 30 Calc. 609.

(5) (1907) I. L. R. 31 Mad. 71.

(6) (1907) I. L. R. 34 Calc. 672.

(7) (1910) 7 All. L. J. 420.

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LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Doss.

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May 16.

PANCHANAN BOSE
v.
CHANDI CHARAN MISRA.*

Lease—Unregistered Solehnama, admissibility in evidence of—Registration Act (III of 1877) s. 17, cls. (d) and (h).

A *solehnama*, by which no immediate interest in immoveable property is created, and whereby there has been no demise, does not amount to a 'lease' within the meaning of clause (d) of s. 17 of the Registration Act, and is merely an agreement to create a lease on a future day.

Such a document falls within clause (h) of s. 17 of the Indian Registration Act and is admissible in evidence without registration.

APPEAL by the plaintiffs, Panchanan Bose and others.

The suit was for declaration of the plaintiffs' right to a *patta* in a four-anna share in the lands described in the schedule of the plaint, for recovery of possession after declaration of title and partition by metes and bounds and for other incidental reliefs. The case of the plaintiffs was that, in a compromise petition in a title suit No. 350 of 1903, defendants Nos. 1 and 2 had agreed to settle with them two annas share of the *hasil* and *gora* lands of *mauza* Jamabuni by execution of a *patta* in their favour. In the title suit a decree was made in terms of the compromise-deed. The defendants having subsequently refused to fulfil the agreement, this suit was brought. The defendants Nos. 1 and 2 contended, *inter alia*, that the *solehnama* made in title suit No. 350 of 1903 was not admissible in evidence for want of registration. The Court of first instance upheld the contention of the defendants and dismissed the suit. On appeal, the Subordinate Judge confirmed the decision of the Munsif. The plaintiffs preferred a second appeal to the High

*Letters Patent Appeal No. 109 of 1909, in Appeal from Appellate Decree, No. 2858 of 1907.

Court, which was heard by Sharfuddin J., sitting singly. The judgments of the Courts below were again confirmed; hence this appeal under section 15 of the Charter.

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Babu Dwarkanath Mitra, for the appellants. The *solehnama* is admissible in evidence, I contend. In the first place, as the *solenamah* was incorporated in the decree of the previous suit No. 350 of 1903, it did not require registration, although it dealt with lands extraneous to the previous litigation of 1903. In the second place, even if it be assumed that the *solehnama* was not incorporated in the decree, as the agreement was to grant a *patta* which, when executed, would create a right, it did not require registration under section 17, clause (h) of the Registration Act: *Bindesri Naik v. Ganga Saran Sahu* (1) and *Pranal Anni v. Lakshmi Anni* (2). The decisions in *Birbhadra Rath v. Kalpataru Panda* (3) and *Gurdeo Singh v. Chandrikah Singh* (4) are inconsistent with the decision of the Judicial Committee in *Pranal Anni's* case (2). The decision of the Judicial Committee lay down no such limitation as is supposed in the two Calcutta cases. The cases of *Raghubans Mani Singh v. Mahabir Singh* (5) and *Gobinda Chandra Pal v. Dwarka Nath Pal* (6) give a truer explanation of *Pranal Anni's* case (2). As has been held by Mitra J., the lands outside the suit may be regarded a consideration for the compromise. The inclusion of the lands outside the suit in the decree did not render the decree *ultra vires*: *Purna Chandra Sarkar v. Nil Madhub Nandi* (7). On the other point, I submit that the agreement in this case did not create any right to immoveable property, but simply created a right to obtain a *patta*: *Pertap Chunder Ghose v. Mohendranath Purkait* (8), *Ambica Prosad Dass v. Galstaun* (9), *Gupta Narain Das v. Bijoya Sundari Debya* (10),

(1) (1897) I. L. R. 20 All. 171;

L. R. 25 I. A. 9.

(2) (1899) I. L. R. 22 Mad. 508;

L. R. 26 I. A. 101.

(3) (1905) 1 C. L. J. 388.

(4) (1907) I. L. R. 36 Calc. 193.

(5) (1905) I. L. R. 28 All. 78.

(6) (1908) I. L. R. 35 Calc. 837.

(7) (1901) 5 C. W. N. 485.

(8) (1889) I. L. R. 17 Calc. 291;

L. R. 16 I. A. 233.

(9) (1909) 13 C. W. N. 326.

(10) (1897) 2 C. W. N. 663.

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Purmananddas Jiwandas v. Dharsey Virji (1), *Burjorji Cursetji Panthaki v. Muncherji Kuverji* (2).

Babu Kshettramohan Sen, for the respondents. The *solehnama* was not included in the decree. The decree made reference only to the lands in suit and did not incorporate the other provisions. Even assuming that it was so incorporated, there would still be necessity for registration, as it purported to deal with lands outside the suit. I rely on the cases of *Birbhadra Rath* (3) and *Gurdeo Singh* (4). The Court has no jurisdiction under section 375 of the Code to pass a decree with regard to lands outside suit. The decision in *Pranal Anni's* case (5) is inconclusive on this question. On the other hand, the fact that their Lordships held that the *razinama* required registration rather helps my contention. With regard to the second point, I contend that the *solehnama* created the right to the land, and there remained only the formal exchange of *patta* and *kabuliyat*. *Ambica Prosad Dass's* case (6) is distinguishable, as there the agreements referred to a future time. I rely on *Syed Sufdar Reza v. Amzad Ali* (7).

Babu Dwarkanath Mitra, in reply. All the Courts have proceeded on the footing that the *solehnama* was incorporated in the decree and it is too late now to contend otherwise.

Cur. adv. vult.

JENKINS C.J. This case comes before us by way of second appeal, the suit being one by which the plaintiffs seek a declaration of their right to a *patta* in a four-anna share in the lands described in the schedule, for relief in respect of that four-anna share and for possession. The suit is based on a *solehnama* or agreement of compromise, by which the differences in a former suit, that is, suit No. 350 of 1903, were composed.

The defendants have objected to the plaintiff's claim on several grounds, but on appeal the only point discussed has been

(1) (1885) I. L. R. 10 Bom. 101.

(2) (1880) I. L. R. 5 Bom. 143.

(3) (1905) 1 C. L. J. 388.

(4) (1907) I. L. R. 36 Calc. 193.

(5) (1899) I. L. R. 22 Mad. 508.

(6) (1909) 13 C. W. N. 326.

(7) (1881) I. L. R. 7 Calc. 703.

whether or not the *solehnama* was admissible in evidence. The view that has found favour with the lower Courts and also with Mr. Justice Sharfuddin, before whom the case came by way of appeal in the first instance, has been that it was inadmissible, and it is from the judgment confirming the decree of the lower Appellate Court that the present appeal is preferred under clause 15 of the Letters Patent.

Before us it has been contended by the appellants that the lower courts and Mr. Justice Sharfuddin committed an error, in so far as they held that the document and its terms had not been proved; and it has been contended that there was no need for registration, *first*, because the terms were embodied in a decree or order of the Court; and, *secondly*, because the document did not actually amount to a lease, but merely created a right to obtain another document which, when executed, would create an interest in land.

The first of these points is one of considerable interest, and though two decisions of this Court in *Birbhadra Rath v. Kalpataru Panda* (1) and *Gurdeo Singh v. Chandrikah Singh* (2), are opposed to the appellants' contention, it certainly is worthy of consideration whether the view that prevailed in *Gobinda Chandra Pal v. Dwarka Nath Pal* (3) does not give a true exposition of the decision of their Lordships of the Privy Council in *Pranal Anni v. Lakshmi Anni* (4). In the view, however, that I take of this case, it is unnecessary to decide that point, because, in my opinion, the *solehnama* here does not amount to a lease within the meaning of clause (d) of section 17 of the Registration Act. On a fair reading of the document, I think that no immediate interest was created, there was no present demise, and the document was merely an agreement to create a lease on a future day, the terms of which were to be defined by documents to be thereafter executed. The case, therefore, seems to me to fall within clause (h) of section 17 of the Registration Act. This being so, I think the appellants have rightly contended before us that the document was

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(1) (1905) 1 C. L. J. 388.

(2) (1907) I. L. R. 36 Cal. 193.

(3) (1908) I. L. R. 35 Calc. 837.

(4) (1899) I. L. R. 22 Mad. 508.

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admissible in evidence. The result of that view is that the decree of the lower Appellate Court cannot be sustained. We, therefore, set aside that decree and the plaintiffs undertaking to execute the requisite *kabuliyat*, we direct defendants Nos. 1 and 2 to execute a *patta* in respect of two annas share of the whole *manza* in accordance with the terms of the *solehnama*, and that the plaintiffs do thereupon recover from the defendants possession of the property; liberty will be reserved to the plaintiffs to apply to us in case any difficulty arises in getting the *patta* executed or otherwise.

Defendants Nos. 1 and 2 will pay the plaintiff's costs throughout.

Doss J. I agree.

S. M.

Appeal allowed.

CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Teunon.

1910
 May 16.

ANU SHEIKH

v.

EMPEROR.*

Magistrate, transfer of—Inquiry—Continuance of inquiry by another Magistrate without the examination of the witnesses de novo—Criminal Procedure Code (Act V of 1898) ss. 145, 350.

Section 350 of the Criminal Procedure Code applies to an inquiry under section 145.

Where a Magistrate, who has commenced such an inquiry, is transferred, and the District Magistrate has made over the case to another Magistrate, the latter has power, under section 350 of the Code, to proceed with it without examining the witnesses *de novo*.

MOTION.

A dispute having arisen between the petitioner, Anu Sheikh, the first party, and Jitu Sheikh and others, second party,

*Criminal Motion No. 625 of 1910, against the order of Nagendra Chandra Sen, Deputy Magistrate of Mymensingh, dated March 14, 1910.

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regarding the possession of a certain plot of land, the former filed an application, under section 107 of the Criminal Procedure Code, on the 16th July 1909, against the members of the second party, before the District Magistrate of Mymensingh. On the same day the latter, however, cut and removed the crop on the disputed land, whereupon the petitioner instituted criminal proceedings against them under sections 426 and 447 of the Penal Code. On the 26th August the District Magistrate called for a report from the police under section 145 of the Criminal Procedure Code. The Sub-Inspector of Muktagacha thana accordingly submitted a report which was sent for disposal by the District Magistrate, on the 6th September, to Babu J. M. Das, a Deputy Magistrate, who, on the 17th, drew up a proceeding under section 145 of the Code against the parties and attached the land. On the 2nd October the District Magistrate transferred the case to Babu S. C. Sinha, another Deputy Magistrate, before whom the trial under the Penal Code was pending. He took up the section 145 proceeding first, and after receiving the written statements of the parties, examined ten witnesses for the petitioner on the 11th and 20th December, and adjourned the case to the 25th January 1910 for the examination of the witnesses of the second party. In the meantime Babu S. C. Sinha was transferred from the district, and the District Magistrate made the case over to Babu N. C. Sen, a Deputy Magistrate, on the 10th February. Babu N. C. Sen proceeded to examine the witnesses of the second party without holding an inquiry *de novo*, and by his order, dated the 14th March, declared them to be in possession. The petitioner, thereupon, moved against the said order and applied for a rule to set it aside.

Babu Sarat Chandra Roy Chowdhry and Babu Charu Chandra Bhattacharji, for the petitioner.

HARINGTON AND TEUNON JJ. The first point taken is that this proceeding, having begun before one Magistrate and continued and ended by another, is without jurisdiction, because the second Magistrate had no jurisdiction to make the

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order. But section 350 of the Code of Criminal Procedure provides: "whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has, and who exercises, such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and re-commence the enquiry or trial." Now, it is argued that that section does not apply. But that section is in its terms wide enough to cover every trial or inquiry under the Code of Criminal Procedure, and the proceeding under section 145 is, we think, an inquiry, because in it the Magistrate's duty is to enquire who is in possession of the disputed area. We think, therefore, that the terms of section 350 apply wherever a Magistrate has ceased to exercise jurisdiction therein. Now, in the present case the Magistrate who began ceased to exercise jurisdiction because he was transferred, that is to say his office, *quâ* the exercise of jurisdiction in this particular case, was vacated and the case was transferred to the file of another Magistrate, who then became the successor of the Magistrate who had vacated the office, in the sense that he exercised the jurisdiction over the case which had been exercised by the Magistrate who had begun the case. We think, therefore, that the second Magistrate came within section 350 of the Criminal Procedure Code.

Then, with regard to the other point, the Magistrate has found that the other party has been in possession for two months, and that brings him precisely within the proviso of clause (4) of section 145 of the Criminal Procedure Code. We cannot, therefore, say that the order was made without jurisdiction. For these reasons, the order must stand. This application is accordingly refused.

F. H. M.

Application refused.

CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

MOFIZ SHEIKH

v.

RASIK LAL GHOSE.*

1910
May 26.

Landlord and tenant—Kaimi lease—Lease created before the Transfer of Property Act (IV of 1882)—Trees planted after lease—Right of removal of trees by tenant—Fixtures, doctrine of—Bengal Tenancy Act (Act VIII of 1885) s. 23—Transfer of Property Act (IV of 1882) ss. 2, 108 (h).

In the absence of any special provision in a lease granted before the Transfer of Property Act (IV of 1882) came into force, the property in the trees planted by the lessee after a *kaimi* lease had been granted, does not vest in the landlord.

The rule laid down in s. 108, cl. (h) of the Transfer of Property Act (IV of 1882) has no application to such a case.

The lease in the present case not being for agricultural or horticultural purpose, s. 23 of the Bengal Tenancy Act has no application.

The doctrine of the English Law of Fixtures cannot be appropriately extended to this country on equitable grounds.

Bain v. Brand (1), *Mears v. Callender* (2), *Elwes v. Maw* (3), *Ness v. Pacard* (4) referred to.

The Law of Fixtures is not recognised under the Hindu or Mahomedan laws.

Thakoor Chunder Paramanick v. Ramdhone Bhattacharjee (5), *Secretary of State v. Charlesworth Pilling & Co.* (6), *Khodeeram Serma v. Trilochun* (7), *Jankee Singh v. Bukhooree Singh* (8), *Pogose v. Nyamutoollah* (9), *Brij Bhookun v. Dabee Dyal* (10), *Kalee Pershad Dutt v. Gouree Pershad Dut* (11) relied upon.

Before the passing of the Transfer of Property Act, the doctrine of the English Law of Fixtures did not prevail in this country, and the provisions of

*Civil Rule No. 1004 of 1910, against the order of Sarat Chandra Ghose, Munsif of Jessore, exercising the powers of a Small Cause Court Judge, dated Dec. 2, 1909.

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| (1) (1876) 1 App. Cas. 762, 772. | (6) (1901) I. L. R. 26 Bom. 1. |
| (2) [1901] 2 Ch. 388. | (7) (1801) 1 Mac. Sel. Rep. 35. |
| (3) (1802) 2 Smith's L. C. 189, 211;
3 East 38. | (8) (1856) Beng. S. D. A. 761. |
| (4) (1829) 2 Peters 137. | (9) (1858) Beng. S. D. A. 1517. |
| (5) (1866) 6 W. R. 228;
B. L. R. F. B. 595. | (10) (1863) 2 Agra. S. D. A. 480. |
| | (11) (1866) 5 W. R. 103. |

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that Act substantially reproduced the law on this subject as recognised by Hindu and Mahomedan jurisprudence.

Ismail Kani Rowthan v. Nazarali Sahib (1) referred to.

RULE granted to the defendant Mofiz Sheikh, the petitioner.

The plaintiffs brought a suit against the defendant for damages for the removal of jack trees growing on the plaintiff's land leased to the defendant. The defendant admitted the lease, but alleged that he and his ancestors have been in possession of the property for over 100 years under a *kaimi* right, and that the trees were planted by his grandfather after the lease had been granted, and he was therefore entitled to remove the same. The Court of first instance ignoring the evidence given by the defendant that the trees had been planted after the lease had been granted, decided that, as the defendant was not a cultivator, section 23 of the Bengal Tenancy Act (VIII of 1885) did not apply, and the tenant was not entitled to cut down and appropriate the trees in the absence of any evidence to establish any contractual or customary right.

The defendant, thereupon, moved the High Court and obtained this rule.

Babu Debendra Chandra Mallick, for the opposite party. This case is governed by section 23 of the Bengal Tenancy Act (VIII of 1885). The property in the trees belongs to the landlord. The occupancy tenant has only a right to enjoy the benefits during his occupancy. He may not appropriate the trees when felled unless the landlord's rights are modified by custom or contract, and the onus of proving the custom is on the tenant: *Nafar Chandra Pal Chowdhuri v. Ram Lal Pal* (2), *Ruttonji Edulji Shet v. The Collector of Tanna* (3), *Nuffer Chunder Ghose v. Nund Lal Gossyamy* (4), *Sitab Rai v. Dubal Nagesia* (5).

Dr. Suhrawardy (*Moulvi Nuruddin Ahmed* with him), for the petitioner. The present case is not governed by section

(1) (1903) I. L. R. 27 Mad. 211.

(3) (1867) 11 M. I. A. 295.

(2) (1894) I. L. R. 22 Calc. 742.

(4) (1890) I. L. R. 22 Calc. 751, note.

[(5) (1907) 6 C. L. J. 218.

23 of the Bengal Tenancy Act (VIII of 1885). Apparently section 108 (h) of the Transfer of Property Act (IV of 1882) alone is applicable. If that section is held to be applicable, the tenant was perfectly justified in cutting and appropriating the trees planted by his ancestors.

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[MOOKERJEE J. The tenancy commenced prior to the Transfer of Property Act. The provisions of section 2 of the Transfer of Property Act exclude the operation of section 108 (h). What was the law applicable prior to 1882 ?]

Prior to legislation, custom must be law. In the absence of statutory or judicial rule, the rules of equity, justice and good conscience should apply. The principles recognised by English law ought not to be extended to this country.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. The substantial question of law which calls for decision in this rule, relates to the right of a tenant of homestead land to cut and appropriate fruit-trees grown by him or his predecessors-in-interest on the holding, when it is established that the tenancy was created before the Transfer of Property Act, 1882, came into operation. The plaintiffs, opposite party, commenced this action for recovery of damages on the allegation that the defendant petitioner had cut and appropriated one jack tree which stood on his holding. The defendant resisted the claim, *inter alia*, on the ground that the tree had been planted by his grandfather after the commencement of the tenancy, and that he was consequently entitled to cut and appropriate it. The learned Judge of the Court of Small Causes did not come to any finding upon this point, but decreed the suit on the ground that, as the defendant was not a cultivator, section 23 of the Bengal Tenancy Act, 1885, was inapplicable, and consequently the tenant was not entitled to cut and appropriate the tree in the absence of any evidence to establish a contractual or a customary right to that effect. We have been invited by the defendant to set aside this judgment on the ground that, as the tree was planted by the tenant, and the holding was of a

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non-agricultural character, he was entitled to cut and appropriate the same.

It may be stated at the outset that the evidence as to the origin of the tenancy and the time when the tree was planted is entirely one-sided, and is sufficient to establish the allegations of the defendant that the holding was created long before the Transfer of Property Act came into force, that it was neither agricultural nor horticultural, and that some ancestor of the defendant planted the tree. Section 23 of the Bengal Tenancy Act has, therefore, obviously no application. Under these circumstances, it has been contended before us on behalf of the tenant that under section 108, clause (h) of the Transfer of Property Act, he is entitled to cut and appropriate the tree. This position has been controverted on behalf of the landlord, on the ground that, by reason of the provisions of section 2 of the Transfer of Property Act, the rule laid down in section 108, clause (h), is inapplicable; and it has further been argued that as no statutory provisions govern the matter, the property in the tree ought to be deemed to have vested in the landlord on the principle that what is permanently attached to the earth becomes part of the soil and passes with it. In this connection, reference has been made to the rule on the subject recognised under the Common Law of England. Before we examine the validity of these arguments, it is desirable to consider for a moment what law is applicable to the matter now before us.

In the first place, it is clear that the provisions of the Bengal Tenancy Act have no application, because, as found by the Judge in the Court below, the tenancy is neither agricultural nor horticultural. No useful purpose, therefore, would be served by an examination of the provisions of section 23 of that Act, or of the judicial decisions in which that section has been interpreted; nor is it necessary to review the earlier cases which refer, directly or indirectly, to the principles of law applicable to agricultural tenancies before the Bengal Tenancy Act came into force. It is also clear that the rule laid down in section 108, clause (h), of the Transfer of Property

Act has no application, because section 2 expressly provides that nothing contained in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force, or any relief in respect of any such right or liability. No doubt it is conceivable that provisions of the Act which are consistent with the rules of justice, equity and good conscience may be applied to cases where the legal relation was created before the Act came into force [*Parameshri v. Vithappa* (1)], but such application is sustained, not on the ground that the provisions of the Act directly govern the matter, but rather on the principle that, in the absence of any statutory or judicial rule applicable to the subject, the rules recognized by the Act may be applied as based on equitable grounds. In view, therefore, of the provisions of section 2 of the Transfer of Property Act which excludes the operation of section 108, clause (h), and in view of the nature of the holding which excludes the operation of section 23 of the Bengal Tenancy Act, we are left without any statutory provision which directly governs the matter. The landlord has, therefore, contended that the rules of English Law on the subject should be adopted and applied as based upon grounds of justice, equity and good conscience. In answer to this contention, it has been argued by the tenant that the principles recognised by the English law are based upon a technical law of Fixtures, and ought not to be extended to this country, inasmuch as a law of Fixtures does not find a place in the Common Law of India.

It cannot be disputed that under the law of England the property in trees is vested in the owner of the inheritance of the land upon which they grow, on the principle that the property in trees, or of that which is likely to become timber; is in the landlord: *Berriman v. Peacock* (2). On this ground it has been ruled that a farmer who raises young fruit-trees on the demised land for filling up the orchards, is not entitled to sell them; but it is otherwise of a nurseryman by trade, who may, if he has planted fruit trees in the way of his trade,

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(1) (1902) 12 Mad. L. J. 189.

(2) (1832) 9 Bing. 384; 35 R. R. 568.

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remove them, if not of larger growth than could be dealt with in his trade : *Penton v. Robart* (1), *Wyndham v. Way* (2) and *Wardell v. Usher* (3). Similarly, it has been ruled that a tenant, not being a gardener, cannot remove a border of box planted on the demised premises by himself, unless by special agreement with his landlord [*Empson v. Soden* (4) and *Jenkins v. Gething* (5)]. A tenant of a garden may not also plough up and destroy the strawberry beds, although he paid the preceding tenant for them : *Watherell v. Howells* (6). These cases are based on the principle that whatever is affixed to the soil becomes, in contemplation of law, a part of it, and is subject to the same rights of property as the soil itself. The maxim *quicquid plantatur solo solo cedit* is, as Broom points out (*Legal Maxims*, 305), one of great antiquity, and has been treated as a part of the law of England from very early times. This is clear from a significant passage in Bracton (edited by Sir Travers Twiss, Vol. 1, p. 79, Book 2, Chap. 2, sec. 6) : " whatever is planted, sown or built in, belongs to the soil, if root has struck." The same reason is assigned by Britton and Fleta for the position that, if trees are planted or seeds sown in the land of another, the owner of the soil becomes owner also of the tree, the plant, or the seeds as soon as it has taken root [Britton, Book II, Chap. 2, section 6 ; Chap. 12, sec. 2, Ed. Nichols, Vol. I, pp. 217, 288 ; Fleta, Book III, Chap. 2, sec. 12, pp. 176, 177, 220]. It may be conceded, therefore, that, under the law of England, a tree planted by the tenant on his holding cannot ordinarily be removed by him on the ground that the property in the tree is vested in the owner of the soil. The question, therefore, arises, how far this doctrine, based upon a law of fixtures, was applicable to this country before the Transfer of Property Act came into operation. We have been invited by the learned vakil for the landlord to hold that the

(1) (1801) 2 East 88 ; 6 R. R. 376.

(2) (1812) 4 Taunt. 316 ;

13 R. R. 607.

(3) (1841) 3 Scott. N. R. 508 ;

60 R. R. 645.

(4) (1833) 4 B. & Ad. 655 ;

38 R. R. 347.

(5) (1862) 2 J. & H. 520.

(6) (1808) 1 Camp. 227.

principle is one based on justice, equity and good conscience, and consequently applicable to this country. We are unable to adopt this contention as well-founded. The tenant who has taken the land is bound, upon the termination of his tenancy, to restore the land to his landlord in the same condition in which he took it; but it is difficult to appreciate upon what intelligible principle he may be compelled to leave on the land trees grown and structures erected by him for his own benefit. It must further be remembered that the tendency under English law has been to restrict rather than to enlarge the scope and operation of the law of Fixtures, and various exceptions have been allowed in favour of trade fixtures and agricultural fixtures: *Bain v. Brand* (1), *Mears v. Callender* (2), notes to *Elwes v. Maw* (3); while in American Courts, when an attempt was made to apply in its entirety the doctrine that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed except by him who is entitled to the inheritance, Mr. Justice Story, in delivering the unanimous judgment of the Supreme Court of the United States, declined to give effect to the contention on the ground that the law of Fixtures was not suited, in its unqualified form, to the circumstances of the country: *Ness v. Pacard* (4). Under such circumstances, it would obviously be inappropriate to extend the doctrine of Fixtures to this country as based on equitable grounds. This position is fortified when we remember that neither the Hindu Law nor the Mahomedan Law recognised any law of Fixtures, as was pointed out by Sir Barnes Peacock C.J. in the case of *Thakoor Chunder Paramanick v. Ramdhone Bhattacharjee* (5).

If we look to the ancient Hindu Law, we find the following texts in the Institutes of Narada (Chap. II, verses 20, 21; Sacred Books of the East, Vol. 33, page 143):

“(20) If a man has built a house on the ground of a stranger and lives in it, paying rent for it, he may take with him, when

(1) (1876) 1 App. Cas. 762, 772.

(2) [1901] 2 Ch. 388.

(3) (1802) 2 Smith's L. C. 189, 211;
3 East 38.

(4) (1829) 2 Peters 137.

(5) (1866) 6 W. R. 228;

B. L. R. F. B. 595.

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he leaves, the house, the thatch, the timber, the bricks and other building materials.

“(21) But if he has been residing on the ground of a stranger without paying rent and against that man’s wish, he shall by no means take with him on leaving it the thatch and timber.”

These texts are quoted as authoritative by Jagannath in his Digest of Hindu Law (tr : Colebrooke, Book III, Chap. 2, para. 99, Vol. II, page 398), who quotes another text of Narada which explains the reason for the rule : “The grass, wood and bricks which are thus removed belonged to him who leaves the ground, provided he paid rent for the spot, and not otherwise.”

When we turn to the Mahomedan Law, we find the following passage in the Hedaya : “If a person hire unoccupied land for the purpose of building or planting, it is lawful, since these are purposes to which land is applied. Afterwards, however, upon the term of the lease expiring, it is incumbent upon the lessee to remove the building or trees and to restore the land to the lessor in such a state as may leave him no claim upon it. It is incumbent on the lessee to remove his trees or houses from the land unless the proprietor of the soil agrees to pay him an equivalent, in which case the right of property in them devolves to him (still, however, this cannot be without the consent of the owner of the houses or trees except where the land is liable to sustain an injury from the removal, in which case the proprietor of the land is at liberty to give an equivalent and appropriate the trees or houses without the lessee’s consent), or unless the proprietor of the land assents to the trees or houses remaining there, in which case they continue to appertain to the lessee and the land to the landlord.” (Hedaya, tr. Hamilton, Vol. III, p. 284 ; see also p. 325.) This passage was treated as authoritative by their Lordships of the Judicial Committee in *Secretary of State v. Charlesworth Pilling & Co.* (1).

These principles were repeatedly applied in many earlier cases to be found in our Reports, amongst which reference may

be made to *Khodeeram Serma v. Trilochun* (1), *Jankee Singh v. Bukhooree Singh* (2), *Pogose v. Nyamutoollah* (3), *Brij Bhookun v. Dabee Dyal* (4) and *Kalee Pershad Dutt v. Gouree Pershad Dutt* (5). It has also been recently ruled by Mr. Justice Bhashyam Ayyangar in *Ismail Kani Rowthan v. Nazarali Sahib* (6), that before the Transfer of Property Act came into operation, the English doctrine of fixtures did not prevail in this country, and that the Transfer of Property Act substantially reproduced the law on this subject as recognised by Hindu and Mahomedan jurisprudence. We must consequently hold that, in the case before us, the tenant did not exceed his rights when he cut down the jack fruit-tree which had been planted on his holding by one of his ancestors.

The result, therefore, is that this rule is made absolute, and the suit dismissed with costs both here and in the Court below.

S. A. A. A.

Rule absolute.

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| (1) (1801) 1 Mac. Sel. Rep. 35. | (4) (1863) 2 Agra S. D. A. 480. |
| (2) (1856) Beng. S. D. A. 761. | (5) (1866) 5 W. R. 108 |
| (3) (1858) Beng. S. D. A. 1517. | (6) (1903) I. L. R. 27 Mad. 211. |

LETTERS PATENT APPEAL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Doss.*

NILADRI MAHANTI

v.

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May 27.

Under-tenure, sale of—Execution sale—Effect of sale of under-tenure by co-sharer landlord for arrears of rent—Non-registration of purchase in execution sale by the whole body of landlords—Locus standi to maintain a suit—Rent Recovery Act (X of 1859) ss. 27, 105, 106, 108, 109 and 110—Civil Procedure Code (VIII of 1859) s. 259—Landlord and Tenant Procedure Act (Beng. VIII of 1865).

While under s. 105 of Act X of 1859, which contemplates a decree by the landlord, or the whole body of landlords, for an arrear of the entire rents due in respect of an under-tenure, it is the tenure that is sold, under s. 108, which does not contemplate a decree for an arrear of rent, but a decree for money

* Letters Patent Appeal No. 20 of 1909 in Appeal from Appellate Decree No. 1775 of 1906.

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due on account of a share of rent and a suit for it by only a sharer in a joint undivided estate, it is only the right, title and interest of the judgment-debtor in the under-tenure that passes.

Doolar Chand Sahoo v. Lalla Chabeel Chand (1) and *Shamechand Kundu v. Brojonath Pal Chowdhry* (2) followed in principle.

The purchaser of an under-tenure under s. 105 of Act X of 1859 is entitled to maintain a suit for possession against a subsequent purchaser under s. 108, though he has not got his name registered in the landlord's sherista.

Kristo Chunder Ghose v. Raj Kristo Bandyopadhyaya (3) followed. *Luckhinarain Mitter v. Khettro Pal Singh Roy* (4) referred to.

Patit Shahu v. Hari Mahanti (5) distinguished. *Bichitrananda Roy v. Behari Lal Pandit* (6) questioned.

The mere fact that a person cannot succeed in a suit does not mean that he has no *locus standi* to maintain the suit.

It is only where the Legislature distinctly or in effect provides that certain conditions must be fulfilled to entitle a person to maintain a suit, and those conditions precedent are not fulfilled, that the person has no *locus standi* to sue.

APPEAL by the plaintiffs, Niladri Mahanti and others.

This appeal arose out of a suit for declaration of title to and recovery of possession of certain lands as *lakheraj bajeapti* lands. The case for the plaintiffs was that the *lakheraj bajeapti* tenure, a portion of which is the subject of the suit, was sold in 1900 in execution of a simple money-decree obtained by the defendant No. 9 against the defendant No. 2, and was purchased by the defendant No. 9 himself. The defendant No. 9 afterwards sold the land in suit, which is a portion of the aforesaid tenure, to the plaintiffs by a registered deed in October 1901. The defendants Nos. 4 to 8, who are the 8-anna co-sharer landlords of the estate in which the *lakheraj* tenure is situated, brought a suit for arrears of rent against the defendants Nos. 1 and 2, and on the 28th January 1902 put the tenure to sale. The defendant No. 3 purchased it at that sale and was put in possession. The defendant No. 3 is the contesting defendant in the present suit. The plaintiffs contested the purchase of the defendant No. 3, mainly on the grounds that the purchase by their vendor was earlier, and that the defendants Nos. 4 to 8 being only co-sharer landlords, defendant No. 3

(1) (1878) L. R. 6 I. A. 47;
3 C. L. R. 561.

(2) (1873) 12 B. L. R. 484;
21 W. R. 94.

(3) (1885) I. L. R. 12 Calc. 24.

(4) (1873) 13 B. L. R. 146;
20 W. R. 380.

(5) (1900) I. L. R. 27 Calc. 739.

(6) (1906) 5 C. L. J. 89.

acquired only the right, title and interest of the defaulting judgment-debtors by the purchase. On the other hand, the plaintiffs admitted that their vendor's name had not been entered in the zemindar's *sherista*. The Munsif held that the plaintiffs' vendor had acquired title to the tenure as against the purchaser at an auction sale held in execution of a decree obtained by co-sharer landlords, notwithstanding the fact that his name was not entered in the zemindar's *sherista*. He therefore held that the plaintiffs' title to the lands in suit was good, and he accordingly decreed the suit. On appeal, the District Judge held that the plaintiffs had no *locus standi* to maintain the suit, and reversed the judgment and decree of the Munsif. The judgment of the District Judge was confirmed on second appeal by Brett J., sitting singly. The plaintiffs thereupon preferred this appeal under section 15 of the Letters Patent.

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Babu Prabhash Chandra Mitra (with him *Babu Sushilmadhab Mallik*), for the appellants. A sale under Act X of 1859, in execution of a decree obtained by a co-sharer landlord for his share of rent, can only be held under section 108 and section 110 of the Act. The language of section 108 clearly indicates that the decree is not a rent-decree in the strict sense of the term, but a decree for money on account of rent. Section 110, para. 2, lays down the procedure to be adopted when an under-tenure is sought to be sold in execution of such a decree. The words clearly indicate that the sale is to be held under the provisions of the Civil Procedure Code, and what passes under such a sale is only the right, title and interest of the judgment-debtor. The difference between the language of section 108 and section 105 makes the distinction all the more clear. Section 105 relates to sales held in execution of a decree for arrears of rents obtained by the sole landlord or the whole body of landlords. By the wording of that section, such sales used then to be held under Bengal Act VIII of 1865. The whole tenure passes in such a sale : *Grish Chunder Mitter v. Shaikh Jhakoo* (1), *Nund Lall Roy v. Gooroo Churn Bose* (2), *Bhaba Nath Roy Chowdhry*

(1) (1872) 17 W. R. 352.

(2) (1871) 15 W. R. 6.

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v. *Durga Prosunno Ghose* (1). On the question of *locus standi*, section 27 of Act X of 1859 does not expressly provide that an unregistered transferee should have no *locus standi*. The object of the section is simply that the zemindar should have information as to who is the tenant : *Nobeen Kishen Mookerjee* v. *Shib Pershad Pattuck* (2) and *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhyaya* (3). The last case cited is an authority in my favour, inasmuch as section 64 of Act VIII (B.C.) of 1869 is substantially the same as section 108 of Act X of 1859. It is submitted that the case of *Bichitrananda Roy* v. *Behari Lal Pandit* (4), relied on by Brett J., is not good law.

Babu Greesh Chandra Pal, for the respondents. *Bichitrananda Roy* v. *Behari Lal Pandit* (4) is in point and in my favour. The case of *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhyaya* (3) cited for the appellants was a case under Act VIII (B. C.) of 1869 and is inapplicable. The cases of *Nund Lall Roy* v. *Gooroo Churn Bose* (5) and *Grish Chunder Mitter* v. *Shaikh Jhakoo* (6) are also distinguishable, the facts in those cases being different. Moreover, these cases conflict with the later decisions of this Court in *Patit Shahu* v. *Hari Mahanti* (7) and *Bichitrananda Roy* v. *Behari Lal Pandit* (4) : see also *Shamchand Kundu* v. *Brojonath Pal Chowdhry* (8). Section 64 of Act VIII of 1869 is not the same as section 108 of Act X of 1859. Section 27 of Act X is clear in its terms and the plaintiffs are debarred from maintaining this suit.

JENKINS C.J. This appeal arises out of a suit brought by the plaintiffs to recover possession of certain land which they claim to be their under-tenure. The Munsif passed a decree in the plaintiff's favour. This was reversed by the lower Appellate Court ; and, on appeal to this Court, Mr. Justice Brett has confirmed the decree of the lower Appellate Court. The present appeal is from Mr. Justice Brett's judgment under section 15 of the Letters Patent.

(1) (1889) I. L. R. 16 Calc. 326.

(2) (1867) 8 W. R. 96.

(3) (1885) I. L. R. 12 Calc. 24.

(4) (1906) 5 C. L. J. 89

(5) (1871) 15 W. R. 6.

(6) (1872) 17 W. R. 352.

(7) (1900) I. L. R. 27 Calc. 789.

(8) (1873) 12 B. L. R. 484.

The facts which have given rise to this suit can be briefly stated. The plaintiffs, on the 14th October 1901, purchased the land in suit from defendant No. 9, who himself purchased the under-tenure, of which this land forms part, on the 15th of December 1900 at a sale held in execution of a money-decree passed against defendant No. 1 and the father of defendant No. 2. On the 28th of January 1902, the under-tenure was again put up to sale in execution of a decree against defendants Nos. 1 and 2 obtained by defendants Nos. 4 to 8, who were sharers in the estate to the extent of 8 annas, and claimed in the suit their share of the rent. At that sale defendant No. 3 purchased, and on the 17th of July 1902 he took possession of the property, and thereby, it is said, dispossessed the plaintiffs and their vendor, defendant No. 9. The plaintiffs claim that defendant No. 3 took nothing by his sale as against them, inasmuch as the decree was not a decree for rent, but was a decree for money due on account of a share of the rent of the under-tenure.

The answer made on behalf of defendant No. 3 is that the plaintiffs cannot be heard to advance this contention because they have no *locus standi*, whatever that may mean, inasmuch as the transfer to their vendor as well as to themselves has not been registered in the manner contemplated by section 27 of Act X of 1859. This view has found favour with the lower Appellate Court and with Mr. Justice Brett. The question is whether it can be sustained.

Now, it is to be noticed that the sale to defendant No. 3 was not under section 105 of Act X of 1859, but under section 108, and the distinction is vital. Thus, section 105 contemplates a decree for an arrear of rent due in respect of an under-tenure, and, further, it contemplates that it should be a decree by the landlord, or the whole body of landlords, for the entire rent. The consequence of such a decree is that what is brought to sale is "the tenure.... according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof," an expression which was held by the Privy Council in *Brindabun Chunder Sircar Chowdhry v. Brindabun Chunder*

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Dey Chowdhry (1) to refer to the rules contained in Regulation VIII of 1819 and I of 1820 when Act X of 1859 was passed. Since 1865 these sales have been regulated by Act VIII of 1865 (B. C.). Turning on the other hand to section 108, what is there contemplated is not a decree for an arrear of rent, but a decree for money due on account of a share of rent, and not a suit brought by the landlord or the whole body of landlords, but by a sharer in a joint undivided estate, and it is from the failure to observe the distinction between section 105 and the clauses which are its proper sequel on the one hand, and section 108 and those that amplify it on the other, that the difficulty in this case has arisen. The sale on which defendant No. 3 in this case relies was in execution of a decree under section 108, and it is necessary to see what precisely Act X of 1859 provides in relation to such a decree and its execution. It provides that the under-tenure may be brought to sale in execution of the decree in the same manner as any other immoveable property may be sold in execution of a decree for money under the provisions of sections 109 and 110. Section 109 imposes conditions precedent to the right of the decree-holder to apply for execution against any immoveable property belonging to the debtor. We have no concern with those conditions in this case, because no point has been made with reference to this matter in the lower Courts. Section 110 provides that if, as is the case here, the property be a saleable under-tenure, it shall be sold under the provisions of law for the time being in force applicable to the sale of such under-tenures for demands other than those of arrears of rent due in respect thereof. When Act X of 1859 came into operation, the law for the time being in force was Act VIII of 1859 which, in section 259, provided that, "after a sale of immoveable property shall have become absolute in the manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title and interest of the defendant in the property sold, and such certificate shall be taken and deemed to

be a valid transfer of such right, title and interest." That section is clearly one of those which would certainly be part of the law for the time being in force applicable to the sales of under-tenures for demands other than those of arrears of rent, so that this section indicates what would at that time have passed to a purchaser in the case of a sale in execution of a decree for money due on account of a share of rent. The distinction, therefore, between that which passes on a sale on a decree under section 105, and that on a decree under section 108, is manifest. The matter is brought out with clearness by their Lordships of the Privy Council in *Doolar Chand Sahoo v. Lalla Chabeel Chand* (1), where it said—"Now it is clear that in attaching the property of a judgment-debtor, whether in an under-tenure or in an ordinary leasehold interest, under Act VIII of 1859, you can only attach and sell the right, title and interest of the judgment-debtor; but if you proceed to sell a tenure under section 59 of Act VIII of 1869, then you sell the tenure; and by virtue of section 66 of the same Act, the purchaser, under the provisions of sections 59 and 60 of the Act, acquires it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement." So that it may, I think, fairly be said that while under section 105, which is the equivalent of section 59 of Act VIII of 1869, the tenure would be sold under section 108, it is only the right, title, and interest of the judgment-debtor in the under-tenure that would pass. That is how the matter stood in 1859; but ever since then it has been the accepted doctrine that all that a purchaser would take at a sale in execution under the several successive Codes of Civil Procedure would be the right, title and interest of the judgment-debtor. The same view receives the sanction of the Full Bench in *Shamchand Kundu v. Brojonath Pal Chowdhry* (2). I refer in particular to the remarks made by Mr. Justice Jackson in the course of his judgment. If, then, the matter stood

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there, we should have this position, that all that defendant No. 3, the purchaser at the subsequent execution sale, would get would be the right, title and interest of the judgment-debtor at that time ; in other words, he would get nothing so far as the land in suit is concerned, because, before that execution-purchase, the property had passed successively to defendant No. 9 and the present plaintiffs.

It is next said that the plaintiffs cannot rely on the title so acquired, or, as it has been expressed, that he has not got a *locus standi*. I view the expression *locus standi* with some apprehension, because I do not pretend to know what it precisely means in this connection. Does it mean that defendant No. 9 and the plaintiffs acquired no title because there was no registration ? If that be the contention, then there is a complete answer to this view in the decision of Mr. Justice Wilson and Mr. Justice Beverley in *Kristo Chunder Ghose v. Raj Kristo Bandyopadhyaya* (1), and of the Privy Council in *Luckhinarain Mitter v. Khettro Pal Singh Roy* (2), where, in regard to the effect of similar provisions in Regulation VIII of 1819 for registration of transfer of tenures in the zemindar's *sherista*, their Lordships say—"The plaintiffs were assignees of the *darpatni talook*, and though the transfer was not registered, they had the right and were compelled to deposit the amount of rent due to the zemindar in order to protect their own interest." If, on the other hand, it is meant that the plaintiffs have no right to sue, then this contravenes the general principle that a man in possession of property lawfully acquired by him, but invaded by another, has a right to sue in respect of trespass on it. Whether he will succeed or not is a different question ; but the mere fact that he does not succeed does not mean that he has no *locus standi*. I can understand its being said that a person has no *locus standi* where the Legislature in effect so provides, as, for instance, in section 106 of Act X of 1859, which is limited in its operation to sales under section 105 of transferable tenures in execution of decrees for arrears of rent. It is there provided that while third parties claiming to be the lawful

(1) (1885) L. L. R. 12 Calc. 24.

(2) (1873) 13 B. L. R. 146, 156 ;
 20 W. R. 380.

possessors of the under-tenure may apply for stay of sale and enquiry, no transfer of the under-tenure, which by the provisions of the Act or any other law for the time being in force is required to be registered in the *sherista* of the zemindar or superior tenant, should be recognized, unless it has been so registered, or unless sufficient cause for non-registration be shown to the satisfaction of the Collector. This is a distinct provision of the law that, notwithstanding the title acquired by transfer, it shall not be recognised for the particular purpose contemplated by that section. But the present suit is not one which comes within section 106, and there is no similar provision in relation to a sale under section 108, so that the contention that the present plaintiffs have no *locus standi* is not one that can properly be applied to the circumstances of this case. But it is contended that there are two decisions of this Court by which we are required to hold that the plaintiffs have no *locus standi*. No doubt it was decided in *Patit Shahu v. Hari Mahanti* (1), that plaintiffs who had not registered their names in the landlord's *sherista* had no *locus standi* for the purposes of that suit. But the learned Judges based that proposition solely on the case to which I have referred of *Shamchand Kundu v. Brojonath Pal Chowdhry* (2), which was a case that turned upon section 105 of Act X of 1859, and not upon section 108, and in which, as I have already remarked, the distinction between sections 105 and 108, and the consequence of those sections, have been noticed by one of the learned Judges who was a party to the decision. What the facts were which the Court in *Patit Shahu's case* (1) accepted as facts for the basis of their decision is not clear, but, as far as I can see, the learned Judges in that case did not base their decision on the view that the decree was obtained by one who was a co-sharer, and the language of their judgment is equally consistent with their having supposed that the landlord on whose decree the sale was obtained was the sole landlord. If he was regarded by them as the sole landlord, then the case is no authority for the position with which we have to deal. If they did not so regard him,

(1) (1900) I. L. R. 27 Calc. 789.

(2) (1873) 12 B. L. R. 484;
21 W. R. 94.

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then it appears to me that they failed to observe the sharp distinction drawn by the Legislature, as also the decision of Mr. Justice Wilson, in the case of *Kristo Chunder Ghose v. Raj Kristo Bandyopadhyaya* (1) and of the Full Bench decision in *Shamchand Kundu v. Brojonath Pal Chowdhry* (2). The other case, to which our attention has been invited, is that of *Bichitrananda Roy v. Behari Lal Pandit* (3). That case proceeds upon the view that the plaintiff had no *locus standi*. I have already explained my difficulties with regard to that proposition, and I cannot suppose for a moment that the learned Judges in that case intended to come to a decision which was opposed to the view expressed by the Full Bench, or to the actual decision in *Kristo Chunder Ghose v. Raj Kristo Bandyopadhyaya* (1). The fact is that the decision in *Kristo Chunder Ghose's case* (1) is undistinguishable from the present but for the fact that it proceeded upon Act VIII of 1869, whereas in this case we are concerned with Act X of 1859. But that is merely a difference of name. The provisions of the law in the two cases are substantially the same, and there is no fair distinction that can be drawn for the purposes with which we are now concerned, between the present case and that in *Kristo Chunder Ghose v. Raj Kristo Bandyopadhyaya* (1).

The result, therefore, is that, holding as we must on the plain words of the Act, and also on authorities to which I have adverted, that the plaintiffs acquired a title notwithstanding the absence of registration, and, further, that all that defendant No. 3 took was the right, title and interest of the judgment-debtor, which at that date was nothing so far as concerns the property now in suit, it necessarily follows that the plaintiffs are entitled to the relief they ask of possession as against defendant No. 3.

We must, therefore, set aside the judgment of Mr. Justice Brett and of the lower Appellate Court, and restore the decree of the Munsif with costs throughout.

Doss J. concurred.

S M.

Appeal allowed.

(1) (1885) I. L. R. 12 Calc. 24. (2) (1873) 12 B. L. R. 484; 21 W. R. 94.
(3) (1906) 5 C. L. J. 89.

CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Teunon.

LACHMI NARAYAN MAHTO

v.

CORPORATION OF CALCUTTA.*

1910
May 27,

Acquiescence—Order of demolition of unauthorized erections—Disobedience to such order—Negotiations for compromise—Re-assessment of the whole premises, including the unauthorized portions, and receipt of rates and taxes for the same—Calcutta Municipal Act (Beng. Act III of 1899) ss. 449, 580.

Where after the passing of an order of demolition, under s. 449 of the Calcutta Municipal Act, negotiations have been going on between the person directed to demolish an unauthorized erection and the Corporation, the receipt of rates and taxes by the latter, on re-assessment of the whole premises, including the portions objected to, during the period of such negotiations, is not an acquiescence on their part in the continued disobedience to the order so as to disentitle them from proceeding with the prosecution for such disobedience after the failure of the negotiations.

THE petitioner obtained sanction, on the 15th October 1903, from the Corporation to erect a masonry building at No. 2, Shibtolla Lane, Calcutta. On the 26th May 1904 a new plan was submitted to the Corporation for sanction to certain additions and alterations to the building, but no reply having been received, he commenced the work and completed it in December 1904. On 22nd December he received a notice from the Chairman objecting to the erection of the fourth storey without sanction, and to the omission to keep ten feet space open at the rear of the building. The petitioner was then convicted, on the 17th April 1905, under section 579 of the Calcutta Municipal Act (Bengal Act III of 1899), and fined Rs. 200, and, on the 25th September, an order was made under section 449 of the Municipal Act for the demolition of the unauthorized portions of the building within two months. The petitioner was next convicted, under section 580 of the Act, on the 19th March 1906, and fined Rs. 300 for disobedience to the order of demolition. On the 24th April a fresh prosecution under section

*Criminal Revision No. 568 of 1910 against the order of Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated March 8, 1910.

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580 was instituted against him for continued disobedience of the order of the 25th September 1905. His attorney then wrote to the Chairman, on the 1st August 1906, offering to give up a part of No. 2, Shibtolla Lane and to acquire the premises No. 1, in order to widen Shibtolla Lane, at the southern end, if the prosecution was dropped. The Chairman on the receipt of the letter directed a stay of prosecution and referred the letter to the District Committee, who reported, on the 11th February 1907, that, as the existing structure did not interfere with the proper lighting and ventilation of the premises, the unauthorized portions might stand on certain conditions, one of which was that the petitioner should deposit with the Corporation a sufficient sum of money for the purchase of the premises No. 1. The Chairman personally inspected the site and suggested the mode in which certain alterations should be carried out. The alterations not having been made the prosecution was revived, whereupon the petitioner's attorney wrote to the Chairman for written orders in order to execute his directions given on the previous occasion. Negotiations then continued, and a draft agreement was sent to the petitioner for approval, the prosecution having been again stayed. On the 1st April 1909 the Building Surveyor of District No. 1 asked for the return of the draft after having been approved of, whereupon the petitioner applied for assessment of No. 1, and was informed by the Solicitor to the Corporation, on the 15th June 1909, that the matter had been referred to the Assessor. Some further correspondence then passed between the Corporation and the petitioner about the expediting of the assessment. In the meantime the prosecution had been revived, and the petitioner was again convicted under section 580 of the Municipal Act on the 13th July. A week after, the Solicitor to the Corporation wrote to the petitioner informing him that the premises No. 1 had been assessed at Rs. 25,000 and requesting the return of the draft after approval. The petitioner replied, on the 10th September, objecting to the amount and offering a sum of Rs. 20,000 instead, which was refused. On the 14th October the Solicitor to the Corporation wrote to the petitioner to

expedite matters or the prosecution would be continued. The petitioner then asked for three months' time, but this was refused, and the prosecution was revived. He was convicted on the 8th March 1910 under section 580 and fined Rs. 200.

It appeared that the Corporation had re-assessed the premises No. 2, including the portions objected to, and had received taxes in respect of the same since the re-assessment.

The petitioner obtained a Rule from the High Court, on the 2nd May 1910, to set aside the order, on the ground that the Municipality, having assessed the rates on the new building and received them from the petitioner, had assented to his disobedience of the order of demolition.

Mr. Monnier (with him *Mr. Falkner, Babu Atulya Charan Bose and Babu Birbhushan Dutt*), for the petitioner. There has been a long delay in the case. The building was completed in 1904. The Chairman consented to allow the unauthorized portions to stand on certain conditions, lengthy negotiations ensued between the parties, a draft agreement was prepared, and the premises No. 1 were assessed at Rs. 25,000. These facts constitute actual waiver on the part of the Corporation of their right of prosecution in respect of the unauthorized portions of the premises No. 2, and the fact that ultimately the negotiations fell through because the petitioner offered to pay Rs. 20,000 instead, does not revive the right. Further, the Corporation re-assessed the whole premises long ago, and have throughout received the rates and taxes on the same, including the portions objected to, and have accordingly acquiesced in the continued disobedience of the order of demolition: *Abdul Samad v. Corporation of Calcutta* (1), *Chuni Lal Dutt v. Corporation of Calcutta* (2). These cases lay down that a Magistrate has a discretion in the matter, and he should consider whether there has been delay, waiver or acquiescence on the part of the Municipality. He has not considered this view of the case. On the authority of these rulings the acceptance of rates and taxes on re-assessment of the premises amounts to acquiescence.

(1) (1905) I. L. R. 33 Calc. 287.

(2) (1906) I. L. R. 34 Calc. 341.

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Babu Debendra Chandra Mallick, for the Corporation, was not called upon.

HARINGTON AND TEUNON JJ. This is a Rule calling upon the Municipal Magistrate to show cause why the conviction and sentence passed upon the petitioner should not be set aside on the ground that the Municipality, having assessed rates on the new building, and having received them from the petitioner, have assented to his disobedience to the order.

The conviction which was passed upon the petitioner was for disobedience to an order made under section 449 of the Calcutta Municipal Act, directing him to demolish a certain building. The order to demolish the building was made as long ago as the 25th September 1905, and it appears, on the materials before us, that since that order was made the petitioner has been endeavouring to induce the Corporation not to insist on obedience to the order, but to come to terms with him, and on certain considerations to allow him to disregard the order.

He was convicted of disobedience to the order in 1905, and he was also convicted again subsequently. The position now is that negotiations between the parties got as far as a draft agreement, which was prepared some time before April 1909. That draft has not yet been executed, and it appears from what has been stated by the learned counsel who has argued in support of the Rule that the parties are not at one as to the question of amount with reference to the purchase of No. 1, Shibtolla Lane. That having been the state of things, this is the position. The Municipality have an order against the petitioner which *primâ facie* the petitioner is bound to obey. The petitioner has not obeyed it, but has embarked on a series of negotiations with the Municipality which have not yet ended in an agreement executed between the parties, and, therefore, no circumstances have arisen which discharge the petitioner from his liability. The petitioner says that the Municipality have taken rates from him in respect of this very building. He says: "The fact that you have taken these rates amounts to an acquiescence in the existence of this building, and, therefore, you are now precluded from enforcing this order against me

to demolish it." Looking at the whole history of the case, in our opinion, it cannot be said that the acceptance of rates establishes that the Municipality have acquiesced in the disobedience of the petitioner to this order. Up to the present time, according to the petitioner, there have been these negotiations in order that the parties may come to terms. The fact that the negotiations are continuing shows that the Municipality are not willing to surrender their right to have this order obeyed, and I think that that is quite sufficient to show that, in fact, there was no acquiescence notwithstanding the acceptance of rates. If the petitioner's argument was well-founded, it would come to this, that as long as the petitioner could keep the negotiations open between the Municipality and himself, and could avoid complying with the order by amusing them with offers, so long he would be entitled to escape the payment of any rates in respect of the building which has been ordered to be demolished. That proposition seems to us to be so unreasonable that we cannot accede to the view that mere acceptance of rates, pending the negotiations between the petitioner and the Municipality, can amount to an acquiescence on the part of the Municipality in continuous disobedience to this order. The question arose in *Bholaram Chowdhry v. Corporation of Calcutta*,* in which precisely the same point

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Jan. 4.

Babu Atulya Charan Bose, for the appellant.

Babu Debendra Chandra Mallick, for the Corporation.

RAMPINI AND GUPTA JJ. This is an appeal against a conviction, by the Municipal Magistrate of Calcutta, of one Bholaram Chowdhry, for an offence under section 580 of Act III of 1899 (B.C.)

The facts of the case are set forth in the judgment of the Magistrate and are not disputed. They are as follows. The accused built his house in deviation from the plan sanctioned by the Commissioners. He has already been convicted three times under section 580; and this is his fourth conviction. This Bench has already given the appellant two postponements to enable

† Criminal Appeal No. 871 of 1906, from the order of Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated July 28, 1906,

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was taken. In that case it was stated that the fact that the Municipality had accepted rates did not amount to an acquiescence by them in the continued disobedience to an order to demolish. The Judge has there pointed out that, as long as the building stood, the owner and occupier were liable to pay rates in respect thereto. In that case the man had been fined from time to time, and there were negotiations between him and the Municipality with a view to settling the matter on terms. That being so, the question as to the effect of payment of rates in that case is precisely the same as the effect of the payment of rates in the present case, and we agree that, under the circumstances of this case, the receipt of rates by the Municipality does not amount to an acquiescence in the disobedience of the petitioner to the order complained of. The result is that the Rule is discharged.

E. R. M.

Rule discharged.

him to come to terms with the Municipality and comply with their regulations, but he has failed to avail himself of the opportunities thus afforded him of modifying his building.

The learned pleader who appears on his behalf raises three contentions before us : *first*, that the accused, who has been fined Rs. 10 a day for 34 days, is not liable to punishment for more than three days ; *secondly*, that the Municipal Magistrate should have given him an adjournment to enable him to apply to the General Committee ; and, *thirdly*, that his premises have been assessed with an extra tax on account of the improvements he has made, and that, therefore, he is not liable to be fined for having made these improvements.

In our opinion there is no force in any of these contentions. The offence which the appellant has committed is a continuing one, and section 580 of the Municipal Act provides for a daily fine for failing to comply with an order to demolish or alter any building erected without sanction. In the next place we do not think that the Municipal Magistrate was bound to give the accused any adjournment. The accused might easily have come to terms with the General Committee if he had chosen to do so, but, notwithstanding the two adjournments given him by this Court, he has not come to terms.

Then, as to the question of the raising of the assessment, he has not shown us that the room which he erected in contravention of the provisions of the Building Act has been taken into consideration in making the reassessment ; and, *secondly*, even if this had been done, we do not think that he is not liable to be fined under section 580, because the tax is imposed upon a building which he is enjoying, and, as long as he does not alter or demolish the building, he is liable to pay the tax and is not entitled on that account to escape punishment for having erected the building in contravention of the sanctioned plan. This appeal is, therefore, dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pugh.

SAKINA BIBEE

v.

MAHOMED ISHAK.*

1910
May 31.

Mahomedan Law—Probate—Will, admissibility of, in evidence, without probate
—*Probate and Administration Act (V of 1881) s. 4—Succession Act (X of 1865) s. 187—Hindu Wills Act (XXI of 1870) s. 2.*

There is no provision of law rendering it obligatory, in the case of a Mahomedan will, to take probate. After due proof, a Mahomedan will is admissible in evidence, notwithstanding that grant of probate has not been obtained.

Fatma v. Shaik Essa (1) not followed.

Shaik Moosa v. Shaik Essa (2), followed.

Kherodmoney Dossee v. Durgamoney Dossee (3), *Administrator-General of Bengal v. Premal Mullick* (4), *Sarat Chandra Banerjee v. Bhupendra Nath Bosu* (5), *Bhagvansang Bharaji v. Becharadas Harjivandas* (6) and *Surbomungola Dabee v. Mohendronath Nath* (7) referred to.

ORIGINAL SUIT.

On the 9th May 1908, one Sheikh Din Mahomed, a Mahomedan belonging to the Sunni sect, died, leaving a considerable estate in Calcutta, and leaving him surviving three widows, one of whom was Sakina Bibee, four sons, three daughters and two grand-daughters by a pre-deceased son. It appears that on the 2nd October 1902, Din Mahomed had made and published a will, by which he disposed of his property among his then existing heirs, and created a *wakf* for the maintenance of a mosque and a tomb. Thereafter his youngest son was born, and he executed and registered a deed of gift in the favour of this son of two properties acquired subsequent to the will.

This suit was instituted by the widow Sakina Bibee and the two grand-daughters against the other heirs and heiresses of

*Original Civil Suit No. 889 of 1909.

(1) (1883) I. L. R. 7 Bom. 266.

(4) (1895) I. L. R. 22 Calc. 788.

(2) (1884) I. L. R. 8 Bom. 241.

(5) (1897) I. L. R. 25 Calc. 103.

(3) (1878) I. L. R. 4 Calc. 455.

(6) (1881) I. L. R. 6 Bom. 73.

(7) (1879) I. L. R. 4 Calc. 508.

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the deceased for a declaration of their shares and interests in the general estate of the deceased, including the properties disposed of by the will and the deed of gift.

Some of the defendants set up the will and an alleged verbal gift in their favour in opposition to the plaintiff's claim. The youngest son set up the deed of gift in his favour, and further challenged the validity of the will.

It appears that probate of the will had not been obtained. At the trial the will was duly proved and tendered in evidence, and the question arose as to its admissibility in view of the fact that probate had not been obtained.

Mr. H. D. Bose (with him *Mr. C. C. Ghose*), for the plaintiffs. No Mahomedan will, anymore than any other will, is admissible in evidence before grant of probate has been obtained. The executor has no representative capacity until he obtains probate: Evidence Act, section 91, Probate and Administration Act, sections 4 and 12. It was by an oversight on the part of the Legislature that a provision was not included in the Probate and Administration Act, similar to section 187 of the Indian Succession Act, which is made applicable to Hindus by the Hindu Wills Act, section 2. The judgment of West J. in *Fatma v. Shaik Essa* (1) is more in accordance with the general scheme and policy of the Probate and Administration Act, than the judgment of the Appellate Court in *Shaik Moosa v. Shaik Essa* (2).

Mr. Rasul (with him *Mr. Gauher Ali*); *Mr. S. R. Das* (with him *Mr. Sheriff*); *Dr. Suhrawardy* (with him *Mr. Sircar*), for the various defendants.

Mr. Rasul. A Mahomedan will is admissible in evidence without probate. Section 331 of the Indian Succession Act negatives the general application of the Act to Hindus, Mahomedans and Buddhists. It is by an express provision in the Hindu Wills Act that section 187 of the Succession Act is made applicable to Hindus. There is no such statutory direction in the case of Mahomedans: *Shaik Moosa v. Shaik Essa* (2), which

(1) (1883) L. L. R. 7 Bom. 266.

(2) (1884) L. L. R. 8 Bom. 241.

was referred to in *Motibai v. Karsandas Narayandas* (1). See also Wilson's Anglo-Mahomedan Law, 3rd Edition, page 231 : "the person to whom the execution of the last will of a deceased Mahomedan is by the testator's appointment confided may, but need not, apply for probate of the will."

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PUGH J. I think this will must be admitted in evidence. It is admitted by those who object to its admission that the document *quâ* document is duly proved and would have to be admitted, but it is contended that as it is a will it cannot be given in evidence until it has been proved in the Testamentary and Intestate Jurisdiction, and that the probate of the will, when proved, is the only evidence by which it can be brought before the notice of the Court. Now the point turns on the construction of the Probate and Administration Act (V of 1881). That Act provides for the consequences and results that will happen if probate is taken of the will of a Mahomedan, and it seems clear that under such circumstances, by force of section 4 of the Act, all the property of the testator vests in the executor.

As I have said, there is no provision rendering it obligatory in the case of a Mahomedan will to take probate. It is contended by Mr. Bose that, looking at the whole policy of the Act, it would appear that it was intended that Mahomedans as well as Hindus should take probate when there is a will, before that will be acted upon. He adopts as his argument the judgment of Mr. Justice West in *Fatma v. Shaik Essa* (2). That decision, however, was reversed on appeal : *Shaik Moosa v. Shaik Essa* (3). Apart from the respect for and due to the superior Court, the argument in the judgments in the Court of Appeal seems to me to be conclusive, and the judgment of Mr. Justice West adopted by Mr. Bose to be fallacious. It is argued that a certain provision, *viz.*, section 187 of the Succession Act, applies, by virtue of that Act, to certain persons, and that the same provision has been made applicable to Hindus

(1) (1893) I. L. R. 19 Bom. 123.

(2) (1883) I. L. R. 7 Bom. 266.

(3) (1884) I. L. R. 8 Bom. 241.

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by the Hindu Wills Act, 1870, and that the fact that this provision is not included in the Probate and Administration Act must be due to an oversight ; it is urged that if the Legislature had noticed this omission it would have provided for it, and it is said the Court should so proceed to do that which the Legislature has not done, but which it thinks it ought to have done, and would have done, if its attention had been drawn to the matter. I agree with the view of the Appellate Court by which this judgment was reversed on appeal, and I hold that there is no legislation in force requiring probate to be taken of a Mahomedan's will. The position under the will of a Mahomedan, before the Probate and Administration Act came into operation, is one which is thoroughly well established. The position of both Hindus and Mahomedans was at first exactly the same. There has been a divergence in the subsequent legislation as regards Hindus, but we can easily ascertain what the position under a Mahomedan will is by looking at what was the position of both Hindus and Mahomedans before the legislation.

Prior to the Indian Succession Act of 1865, the Court used to grant probate of wills of Europeans and also of Mahomedans and Hindus, but the effect of probate was different in the two cases. In the case of Europeans the personal estate vested in the executor in the same way as it did in England, and as both moveable and immoveable properties do now under the Succession Act. In the case of Hindus and Mahomedans, nothing vested in the executor, the will operated as a gift from the testator to the legatee, and the executor was merely a manager for the purpose of paying the debts and distributing the estate, and in fact carrying out the distribution which the testator intended, but which, by reason of his departure to another place, he was unable personally to carry out. This proposition has been frequently laid down by a number of cases, of which I may mention *Kherodemoney Dossee v. Durgamoney Dossee* (1), and the Privy Council case of *The Administrator General of Bengal v. Premlal Mullick* (2) where the very point, we are now considering, is decided as regards a Hindu. From the judgment

(1) (1878) I. L. R. 4 Cal. 455.

(2) (1895) I. L. R. 22 Cal. 788.

it appears, speaking of an executor of a Hindu estate before the Succession Act, that his powers and functions were not those of an English executor, but rather those of a manager; he did not require probate, and probate, if obtained, would not have vested him with any title to the estate, either real or personal, which he administered.

This is a direct decision of the Privy Council that a Hindu's executor did not require probate, also that he was merely a manager. The same proposition is referred to by Maclean C.J. in *Sarat Chandra Banerjee v. Bhupendra Nath Bosu* (1). Now that being the position clearly laid down as regards Hindus, there can be no doubt that the position regarding Mahomedans was the same in principle—it is undistinguishable. By the Hindu Wills Act of 1870, section 187 of the Succession Act was applied to Hindus. This section renders it compulsory to take probate, but there is no such provision in the Probate and Administration Act, 1881; and no such provision has ever been applied to Mahomedans. It, therefore, follows that the position, as regards Mahomedans, must be the same as it originally was as regards Hindus, and it follows that probate is not necessary. I am referred by Mr. Rasul to a statement in Sir Rowland Wilson's Mahomedan Law, page 231, where the learned author says that the person to whom the execution of a will of a Mahomedan is confided may, but need not, apply for probate of the will, and I agree with the first paragraph of that section; but he proceeds to go on and say, with or without probate he is an executor within the meaning of the Probate and Administration Act. The powers of that Act must be taken to apply to an executor who has not taken probate except where the contrary appears from the context. With due respect to the learned author, he seems to be following the same line of reasoning which Mr. Justice West adopted in *Fatma v. Shaik Essa* (2), which has been held to be wrong by the Appellate Court, and it seems to me that the consequences provided in case of the Probate and Administration Act, as following upon a grant of probate, do not and cannot apply where there is no probate.

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(1) (1897) I. L. R. 25 Cal. 103.

(2) (1883) I. L. R. 7 Bom. 266.

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ISHAK.

PUGH J.

It appears to me that in case of a non-probated will, if I may use the expression, the position must be as it was before the legislation, *i.e.*, the will is a gift from the testator to the legatees, and the executor is merely a manager to carry out the intentions of his testator. I notice, however, from the same passage, that the learned author, quoting from the *Fatawa-Alamgiri*, Baillie 665, states that, according to the Mahomedan Law, the position of a *wasi*, who would correspond to an executor, is that of an *amin* or trustee appointed by the testator to superintend, protect and take care of his property and children after his death; that he is not the legal owner of the property left by the deceased, nor is he the personal representative. He is rather manager or agent for the purpose of payment of the funeral expenses, debts and legatees, to which functions may be added those of guardian of any minor children of the deceased. In my judgment, therefore, the position of an executor who does not take probate is the same as that of a Hindu or Mahomedan executor before the Succession Act, and it is satisfactory to find that it is almost exactly that of the *wasi* or *amin* under the Mahomedan law. It therefore follows that the will should be admitted in evidence though there is no probate, and, as was done in *Bhagvansang Bharaji v. Bechardas Harjivandas* (1), the Court will determine whether it is duly proved in the suit in which it is sought to be made evidence. A similar course was adopted in the case of *Surbomungola Dabee v. Mohendronath Nath* (2).

There being no dispute as to the *factum* of the will, I direct it to be admitted and marked as an exhibit in the case.

[The parties to the suit having eventually arrived at a compromise, a decree was passed in terms of the settlement.]

J C.

Attorney for the plaintiffs: *S. K. Deb.*

Attorneys for the defendants: *G. C. Chunder & Co, S. Alum, N. N. Mitter.*

(1) (1881) I. L. R. 6 Bom. 73.

(2) (1879) I. L. R. 4 Calc. 508.

SPECIAL BENCH.

*Before Mr. Justice Holmwood, Mr. Justice Sharfuddin and
Mr. Justice Chatterjee.*

EMPEROR

v.

ABANI BHUSHAN CHUCKERBUTTY.*

1910

June 6.

Pardon—Forfeiture of pardon—Proper Court to determine the question of forfeiture—Withdrawal of pardon by the Court granting it—Power of the Special Bench to re-open the question on a plea of pardon taken at the trial for the original offence in respect of which it was granted—Criminal Procedure Code (Act V of 1898) ss. 337, 339.

Where an approver, to whom a pardon was granted under section 337 of the Criminal Procedure Code by the committing Magistrate, resiles, at the hearing of the case before the Special Bench, from his deposition given before such Magistrate, the Special Bench can only discharge him, but cannot take any action against him for the offence in respect of which he was accorded the pardon.

If he is proceeded against for the original offence, the committing Magistrate who granted the pardon must determine whether he has complied with its terms or not, and thereby forfeited the same; and the question cannot be re-opened at his trial before the Special Bench for such offence.

Queen-Empress v. Manick Chandra Sarkar (1) approved of.

Emperor v. Kothia (2) and *Kullan v. Emperor* (3) referred to.

King-Emperor v. Bala (4) distinguished.

THE accused was tried at a session of the Special Bench, constituted under section 11 of Act XIV of 1908, on the 6th June, on a charge of dacoity under section 395 of the Penal Code.

The facts of the case appear to be as follows. On the 16th August 1909, at about 1 A.M., a dacoity was committed at Nangla, in the district of Khulna, in the house of one Mathura Nath Poddar. On his information a police investigation was started and several arrests were made. On the 2nd September the accused, Abani Bhushan Chuckerbutty, was arrested in connection with a dacoity which had occurred some time before

* Trial by the Special Bench constituted under Act XIV of 1908.

(1) (1897) I. L. R. 24 Calc. 492.

(3) (1908) I. L. R. 32 Mad. 173.

(2) (1906) I. L. R. 30 Bom. 611.

(4) (1901) I. L. R. 25 Bom. 675.

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at Bighati, and was sent to the Hooghly Jail. It appeared that on the 12th, Superintendent Shamsul Alum, who was in charge of the Bighati case, visited the prisoner in jail. On the next day Mr. Denham, an Officer of the Criminal Investigation Department, went there, and in consequence of a communication from him, the District Magistrate of Hooghly deputed Babu Kumud Nath Mookerjee to go to the jail where the accused made a confession regarding a number of attempted dacoities, including the one at Nangla, admitting general association with others for the purpose of committing dacoities in order to collect money for the purchase of arms and ammunition to be used against the Government. On the 30th October Mr. R. C. Hamilton, District Magistrate of Khulna, tendered him a pardon, under section 337 of the Criminal Procedure Code, during the preliminary inquiry against Bidhu Bhusan Dey and eight others for complicity in the Nangla dacoity which was then being held in his Court. Abani was examined on the 30th and 31st October as a witness, and repeated the statements made in his confession. On the 3rd December the Magistrate committed the accused to the High Court, charging eight of them under section 395 of the Penal Code, and one under sections 305. The case came on for hearing before a Special Bench of the High Court, constituted under section 11 of Act XIV of 1908, and consisting of Woodroffe, Caspersz and Chatterjee JJ., on the 14th March 1910. Abani was examined as a witness on the 15th, when he retracted his confession and his previous deposition, alleging that the whole story as formerly told by him was false, and that he had been tutored while in jail by Shamsul Alum and afterwards by others. He was then allowed by the Court to be treated as a hostile witness and was cross-examined. On the next day the Advocate-General withdrew the case against the accused under trial, and they were acquitted. He then applied to the Special Bench for an expression of opinion that Abani had spoken untruthfully either before the District Magistrate or the High Court in order to enable the former to decide whether the witness had deviated from the conditions of his

pardon. The Court, while refraining from expressing an opinion as to whether or not he had failed to comply with the terms of his pardon, passed the following order :—

Having regard to the evidence that was given by the approver, Abani Bhushan Chuckerbutty, here, as also to the evidence given by him before the Magistrate, we are of opinion that he has given false evidence either in the inquiry before the District Magistrate or before this Court.

The Advocate-General then applied to the Special Bench for sanction, under sections 195 and 339 of the Code, to prosecute Abani for giving false evidence. The Court directed him to renew the application the next day. On the following day, the 17th March, Woodroffe J. informed the Advocate-General that he with Caspersz and Chatterjee JJ. had been appointed a Criminal Bench for the purpose of hearing the application. The Advocate-General then presented his petition containing the assignments of perjury, and the Court granted sanction under sections 195 and 339 of the Code.

On the 2nd April an application was made on behalf of the Crown to the District Magistrate of Khulna, Mr. R. C. Hamilton, to proceed against the accused under section 395 of the Penal Code. He was produced in Court, and the Magistrate asked him whether he relied on the pardon as a plea in bar to his trial for dacoity, whereupon he replied—"I cannot say anything." The Magistrate took some evidence to show that the accused, when examined before the Special Bench, had resiled from his previous deposition. The sanction granted by the High Court was put in, and also its judgment. The accused called no witnesses. The Magistrate thereupon declared his pardon to be forfeited. A preliminary inquiry was then held in respect of the original dacoity, and the accused was committed to the High Court, on the 14th April, charged under section 395 of the Penal Code. The case then came on before the Special Bench constituted under Act XIV of 1908, as stated above. Before the accused was called on to plead, an objection was taken to the trial by the defence.

Mr. J. N. Roy, for the accused. The question under the present Code is not one of withdrawal but of forfeiture. The

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Magistrate may withdraw the pardon, but he must first determine whether it has been forfeited. He cannot go into the question of forfeiture, as he has not the materials necessary for the decision thereon. There should have been an inquiry on the point : *King-Emperor v. Bala* (1), *Emperor v. Kothia* (2). In this case the Special Bench that tried the original case should have determined the point on the evidence before it. The present Special Bench cannot decide the matter, not having before it the proper materials for its judgment. There having been no declaration of forfeiture by proper authority the commitment is illegal, and the pardon is still subsisting.

The Advocate-General (Mr. Kenrick, K.C.), for the Crown. A Magistrate who has granted pardon under section 337 may withdraw it under section 339 : *Queen-Empress v. Manick Chandra Sarkar* (3), *Queen-Empress v. Ramasami* (4). The procedure adopted in this case by the Magistrate was approved of in *Kullan v. Emperor* (5). The cases cited on the other side do not apply. The commitment was, therefore, legal and proper.

Mr. Roy, in reply, referred to *In re Alagirisawmy* (6).

HOLMWOOD J. The plea has been raised before us that there is no proper finding that the forfeiture of pardon under section 339 of the Criminal Procedure Code was incurred in this case, and that, therefore, this Court has no jurisdiction to try the case. Whether we look at the section as it stands, or at the law as laid down by the Bombay and Madras Courts under the present Act, or by this Court under the Act of 1898, there seems to be no doubt that the procedure followed in this case has been the correct procedure.

The defence has principally relied upon *Emperor v. Kothia* (2), where Beaman J. lays down precisely the procedure which has been adopted in this case as the procedure to be followed. At the termination of the trial in which the pardon is given, the

(1) (1901) I. L. R. 25 Bom. 675.

(2) (1906) I. L. R. 30 Bom. 611.

(3) (1897) I. L. R. 24 Calc. 492.

(4) (1900) I. L. R. 24 Mad. 321.

(5) (1908) I. L. R. 32 Mad 173.

(6) (1908) 5 Ind. Cas. 831 ;
7 Mad. L. T. 121.

accomplice must be discharged by the Court which tries the case. In this case it was the Special Tribunal. "Then, if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence": *Emperor v. Kothia* (1). It is clear, therefore, that the Special Tribunal could not in any way proceed against him for the offence in respect of which he was given a conditional pardon. It may also be inferred, from the wording of clause (1), section 339 of the present Code of Criminal Procedure, that the forfeiture is incurred *ipso facto* by the acts of the approver, that is to say, if he either wilfully conceals anything essential or gives false evidence, he does not comply with the conditions upon which the tender was made, and the pardon is forfeited.

In dealing with the matter, the Court will have to consider whether the approver has or has not complied with the conditions upon which the pardon was tendered, and whether he has made a full and true statement and disclosed the true facts. The only difficulty that can arise is whether the inquiry should be made by the committing Court, or be made before us.

It seems clear that the committing Court must be intended to be the Court where the inquiry is to be made, and for this reason. As soon as a charge is drawn up, the accused is *ipso facto* put upon his defence. It does not, therefore, appear to us that the inquiry should be re-opened here, and in the case of *Queen-Empress v. Manick Chandra Sarkar* (2), which is the only authority in this Court, and which appears to apply with equal force to the present law as to the former law, it was laid down that the withdrawal of the conditions of pardon should be under section 339 by the authority that granted it and not by the High Court. The word *withdrawal* has been left out of the present Code, and, as I have just said, the *forfeiture* appears now to operate *ipso facto*.

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(1) (1906) L. L. R. 30 Bom. 611, 621. [(2) (1897) I. L. R. 24 Calc. 492.]

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In the case of *Kullan v. Emperor* (1), which followed the case of *Queen-Empress v. Ramasami* (2), the procedure which has been adopted here appears to have been approved. In the Bombay case, *King-Emperor v. Bala* (3), the facts were quite different. There the withdrawal appears to have taken place behind the accused's back, either in the committing Court, before the first case was tried, or in the Sessions Court immediately the judgment was delivered in the main case.

Now, let us see what happened in this case. The accused, Abani Bhushan Chuckerbutty, was asked, on being produced before the Magistrate when put upon trial in the present case, whether he relied upon the pardon under section 337 of the Criminal Procedure Code as part of his defence. This is his reply—"I cannot say anything." Evidence was accordingly produced for the purpose of proving that he gave false evidence [either in the lower Court, the Magistrate's Court, or in the High Court. The sanction of the High Court was put in, also the High Court's judgment, and one witness was examined. The accused did not wish to call witnesses, and the Magistrate held that it had been proved that Abani Bhushan Chuckerbutty, after accepting pardon, had given false evidence, and that he had thereby forfeited that pardon and would have to be tried for the offence under section 395 of the Indian Penal Code.

Were we to hold that we had jurisdiction to re-open this matter, we should be prejudicing the accused and pre-judging the very question that has to be tried. It is open to the accused here to show that the statement he made on oath was not a false statement, or was a false statement induced by improper influence. It is obviously improper for us to enter upon that which is the main issue in the case, as a preliminary enquiry. The objection is, therefore, overruled.

SHARFUDDIN J. I agree with my learned brother in the conclusion he has arrived at on the law as contained in section 339 of the Criminal Procedure Code. The law is silent regarding

(1) (1908) I. L. R. 32 Mad. 173.

(2) (1900) I. L. R. 24 Mad. 321.

(3) (1901) I. L. R. 25 Bom. 675.

the Court by whose order a pardon to a person who has not complied with the conditions under which it was tendered may be withdrawn. The law is also silent as to the Court by which this question may be determined. The corresponding section of the former Act has declared that such an order could be passed by the Magistrate before trial, or the Court of Session before judgment has been passed; and the High Court is the Court of Session here.

From the wording of the section, it seems to me to be clear that the mere fact that the approver has wilfully concealed anything essential, or has given false evidence, is sufficient to show that he has not complied with the conditions upon which the tender was made, and in that case he may be tried in respect of the offence for which a pardon was tendered, or for any other offence of which he may appear to be guilty in connection with the same matter.

The second clause of this section lays down that a statement made by a person who has accepted a tender of pardon may be used as evidence against him when the pardon has been forfeited.

It is to be observed that the word "forfeited" is not used in the first clause, but in the second, and if both the clauses are taken together, it is clear that the intention of the Legislature was that by the mere fact of concealment or incomplete disclosure or false evidence forfeiture would follow. With these words I agree with my learned brother Mr. Justice Holmwood.

CHATTERJEE J. The contention of learned counsel for the defence that the question as to whether the accused has, by giving false evidence, forfeited his pardon, ought to have been tried by the previous Special Tribunal, does not seem to be sound. The accused was in that case a mere witness. He was not on his defence for any offence charged against him; he had no opportunity to cross-examine any of the witnesses examined in the case. To hold, therefore, that the Tribunal before which he was deposing as a witness was to decide that he was giving false evidence, would be to hold that an accused person may be made liable for an offence without his having

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had an opportunity to cross-examine the witnesses who are examined against him. It cannot, therefore, be said that the Tribunal before which he gave his evidence was the only Tribunal that could decide whether he gave false evidence.

If that was not the proper Tribunal, then the next authorities to be considered are the Magistrate before whom the Crown initiated fresh proceedings against him under section 339 of the Criminal Procedure Code, and this Court.

It must be remembered that this Court is a Special Tribunal acting only after commitment under the provisions of the Criminal Law Amendment Act. Therefore, this Court would not have any jurisdiction to try that question, so that the Magistrate who committed the case was the proper authority to decide that question, but for the purpose of the commitment alone. Upon the evidence adduced by the Crown the pardon was, therefore, forfeited.

The result, therefore, is that I agree with my learned colleagues in holding that it was for the committing Magistrate to decide this question, and he has decided it in this case.

I say this with this qualification, that this is only for the purpose of the commitment, and it is perfectly open to the accused to show before us in this Court that the statements which are alleged to be false are true in fact, or were induced by improper influences.

E. H. M.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

In re A VAKIL'S APPLICATION.*

1910
July 8.

Practice—Vakil's right to appear before a Judge sitting on the Original Side of the High Court—Application to file warrant of attorney—Extraordinary Civil Jurisdiction—Civil Procedure Code (Act XIV of 1882) s. 635—Civil Procedure Code (Act V of 1908) ss. 119, 129.

A vakil of the High Court applied before a Judge sitting on the Original Side of the Court, claiming a right to file a warrant of attorney in respect of a suit pending before the Midnapore District Court, in which a rule had been issued calling upon the plaintiffs to show cause why the suit should not be transferred to the High Court in its Extraordinary Original Civil Jurisdiction :

Held, that having regard to the long-continued course of practice during which vakils never appeared on the hearing of such applications, the present application should be refused.

Held, further, that the Civil Procedure Code of 1908 has nothing to do with a matter governed by old rules in force before 1909

THIS was an application made by Babu Ram Doyal Dey, a vakil of the High Court, for leave to file a warrant of attorney in respect of a suit pending in the Midnapore District Court, in which a rule had been obtained by the defendants, Mr. Donald Weston and others, calling upon the plaintiffs, Upendra Nath Maiti and another, to show cause why the suit should not be transferred to the High Court in its Extraordinary Original Civil Jurisdiction.

Babu Ram Doyal Dey (a vakil of the High Court), submitted that the new Civil Procedure Code made a difference to the provisions in force before 1909, as under section 119 the word 'Ordinary' was omitted before the words 'Original Civil Jurisdiction.' Therefore this application, which was made before the Court in its Extraordinary Civil Jurisdiction, was sound. Under rule 71 of Belchamber's Rules and Orders, vakils were entitled to appear in all cases other than those on the Ordinary Original Civil Jurisdiction of the High Court.

* Application in Original Civil Extraordinary Suit No. 7 of 1910.

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FLETCHER J. This is an application by a gentleman, who is a vakil of this Court, claiming the right to file a warrant of attorney in respect of a suit which is pending in the Midnapore Court, in which a rule has been issued on behalf of the defendants, calling upon the plaintiffs to show cause why the suit should not be transferred to this Court in its Extraordinary Civil Jurisdiction. Now, it is undoubted that vakils have never appeared on the hearing of such an application for transfer. I have made enquiries as to what the practice has been, and in no case have vakils appeared. I have myself been sitting three and a half years on the Original Side of this Court, and during that time I have transferred a certain number of cases to this Court, where I have thought that justice demanded that the trial should take place in this Court rather than in the District Court, and in none of these cases have the parties been represented except by an advocate of this Court instructed by an attorney. There has been a long-continued practice in which vakils have never appeared, dating from the establishment of the High Court in 1862 and continuing down to 1910; and one would have thought that, had the vakils the right to appear, some exercise or claim to exercise that right would have been put forward during a period of almost half a century. I am satisfied that the claim to appear on an application for transfer has never yet been made. That being the established practice of this Court, it would be obviously improper for a single Judge, sitting on the Original Side, to depart from a practice regulating the various branches of the profession for such a period, unless he was satisfied that the practice was wrong.

The learned vakil who appears, says that the new Code of Civil Procedure has made a difference to the provisions in force before 1909 in this respect. Section 119 of the present Code is in the following terms :—

“Nothing in this Code shall be deemed to authorise any person on behalf of another to address the Court in the exercise of its Original Civil Jurisdiction, or to examine witnesses, except where the Court shall have, in the exercise of the

power conferred by its Charter, authorised him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys."

It seems to me that so far from the alteration made by the present section 119 in the wording of the former section 635 by the omission of the word "Ordinary" before "Original Civil Jurisdiction" being in favour of the vakil's contention it is rather against his case. I do not think that the Civil Procedure Code has anything to do with the case, for section 129 provides in respect of High Courts established under the Indian High Courts' Act and by Letters-Patent "nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code." It is, therefore, obvious that the new Code of Civil Procedure has nothing to do with a matter governed by old rules in force before 1909.

I am not satisfied that vakils have ever appeared on a rule for application to transfer, and not being so satisfied, and having regard to the long-continued course of practice during which vakils have not appeared, I think it right to refuse the present application.

Application refused.

R. G. M.

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LETTERS PATENT APPEAL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Doss.*

1910
May 17.

RAJENDRA KUMAR BOSE

v.

GANGARAM KOYAL.*

Pleadings—Fraud, sole ground of relief—Alteration of ground of relief by picking out facts from allegations in the plaint—Defendant's duty in cases based on fraud.

Where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the plaint facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief.

A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward.

Hickson v. Lombard (1) and *Guthrie v. Aboul Mozuffer Nooroodin Ahmed* (2) referred to.

APPEAL by the defendant, Rajendra Kumar Bose.

The defendant in this suit had brought a suit for partition against the plaintiffs, and had in that suit also asked for mesne profits on the allegation of dispossession by the latter from the property—the subject-matter of that suit. The plaintiffs in this suit (defendants in the former) had filed a written statement denying the allegation of dispossession. A preliminary decree for partition was, however, passed by the Court with the consent of the parties to that suit, and the Court reserved for future decision the question of costs and mesne profits. Subsequently, the parties filed a compromise-petition, and the suit was finally decreed against the defendant in that suit (plaintiff in the present one) with mesne profits. The present plaintiffs' case is that it had been agreed between the parties to the

* Letters Patent Appeal No. 71 of 1909, in Appeal from Appellate Decree No. 1729 of 1907.

(1) (1866) L. R. 1 H. L. 324.

(2) (1871) 15 W. R. P. C. 50.

previous suit that there would be no decree for mesne profits, but that the present defendant misled the Court and fraudulently got it to pass a decree with mesne profits; that as the present plaintiffs were under the impression that a decree had been passed in terms of the compromise-petition, they did not make any enquiry about the matter, but came to know about it all after the present defendant had applied in execution-proceedings for ascertainment of mesne profits, etc., under the decree. The present plaintiffs, therefore, brought this suit to set aside a portion of the compromise-decree, on the ground that, in the petition of compromise, there was no mention of any mesne profits, but that the Court by a mistake and without jurisdiction awarded mesne profits to the defendant.

The defendant denied having agreed to give up his claim for mesne profits, denied having misled the Court or having fraudulently got it to pass the decree, and urged that the decree was not against the terms of the compromise-petition that had been filed. He further contended that the Court had jurisdiction to award mesne profits, and that the suit was not maintainable to set aside the decree.

The Munsif decreed the suit. The Subordinate Judge, on appeal, confirmed the decision of the Munsif, although not agreeing with the Munsif on all the points. The second appeal was heard by Carnduff J., sitting alone, and his Lordship confirmed the judgments of the Courts below.

Thereupon, the defendant preferred this appeal under section 15 of the Charter Act.

Babu Dwarkanath Mitier (Babu Sailendranath Palit with him), for the appellant. A suit to rectify mistake in a decree, as in the present case, does not lie in the courts of India; and the plaintiffs having based their case on fraud, and fraud having been negatived by both the Courts below, they should not have been allowed to succeed on the ground of mistake. The case-law in India uniformly, except in one case, lays down that such a suit does not lie: *Chand Mea v. Asima Banu* (1), *Surjan*

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Raot v. Bhikari Raot (1), *Sadho Misser v. Golab Singh* (2). See also *Khuda Bakhsh v. Aziz Alam* (3). The case of *Jogeswar Atha v. Ganga Bishnu Ghattack* (4) is the exception. There are cases in the courts of England where the decree has been set aside, but only where the agreement on which the decree was made was based on mutual mistake: *Ainsworth v. Wilding* (5), *Neale v. Lennox* (6). The decision of Mookerjee J. in *Gulab Koer v. Badshah Bahadur* (7) is an *obiter* on this point. In the next place, I contend that the plaintiffs should not have been allowed to make a new case of mistake.

Babu Pravash Chandra Mitter, for the respondent, conceded that the decree could not be set aside on the ground of unilateral mistake, but where there was mutual mistake on both sides a decree could be set aside. The case-law is consistent both in England and in India: see *Gulab Koer v. Badshah Bahadur* (7) where all the English and American authorities are reviewed. There was no investigation into the question of mesne profits before the preliminary decree was passed, and it is clear that the decree-holder did not waive his rights to the mesne profits. It is not correct to say that a new case has been made of mistake. In the plaint there are distinct allegations of mistake.

[JENKINS C.J. But where you have based your case on fraud only, you cannot give up fraud and base your claim on mistake: see *Hickson v. Lombard* (8)]

But here, it would seem, there was an alternative claim founded on mistake. In any event, when the question of mesne profits have not been determined, there should be a remand.

JENKINS C.J. This appeal arises out of a suit brought to rectify a decree passed in a previous suit No. 830 of 1904. If regard be had to the allegations of the plaint, it is apparent that the plaintiffs' case rested wholly on fraud, and the Munsif has correctly described the position when he said—"The plaintiffs' case is that the decree was vitiated by fraud, which consisted in

(1) (1893) I. L. R. 21 Cal. 213.

(2) (1897) 3 C. W. N. 375.

(3) (1904) I. L. R. 27 All 194.

(4) (1904) 8 C. W. N. 473.

(5) [1896] 1 Ch. 673.

(6) [1902] A. C. 465.

(7) (1906) 13 C. W. N. 1197.

(8) (1866) L. R. 1 H. L. 324, 336.

the present defendant having misled the Court to pass the decree." The fraud was negatived, and thereupon a case of mistake was set up, and on this ground the Munsif passed a decree in the plaintiffs' favour. This was confirmed by the lower Appellate Court, and also by the judgment of this Court on appeal when the case was heard by a single Judge. From this judgment the present appeal is preferred.

I take it to be well-established that where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the plaint facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives : see *Hickson v. Lombard* (1). This statement of the law has been treated by the Privy Council as applicable in India : see *Guthrie v. Abool Mozuffer Nooroodin Ahmed* (2), and the present case falls precisely within it ; for the charge was one of fraud, and that having failed, the plaintiffs by picking out stray allegations from their plaint have endeavoured to make good a case entitling them to rectification on the ground of mistake. I refrain from discussing the question as to how far the Courts in India can entertain a separate suit to rectify a consent-decree on the ground of mistake, as for the reason I have already stated, the decree of the lower Appellate Court should be set aside and the suit dismissed with costs throughout.

Doss J. I agree.

Appeal allowed.

S. M.

(1) (1866) L. R. 1 H. L. 324, 336. (2) (1871) 15 W. R. P. C. 50, 54.

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APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Richardson.

1910
May 25.

PRAHLAD CHANDRA DAS

v.

DWARKA NATH GHOSE.*

*Adoption—Valuation of suit—Suit to set aside Adoption—Munsif, jurisdiction of
—Forum—Practice.*

According to a long-standing practice, a suit to set aside an adoption is, for the purposes of jurisdiction, incapable of valuation; and it is competent to the plaintiff in such a suit to value the relief claimed, and that valuation determines the forum to decide the suit.

Aklemannessa Bibi v. Mahomed Hatem (1) commented on.

Jan Mahomed Mandal v. Mashar Bibi (2) referred to.

SECOND APPEAL by the defendants, Prahlad Chandra Das and others.

This appeal arose out of an action brought by the plaintiff to set aside an adoption. The suit was brought in the Court of the Munsif, first Court, Barisal. The plaintiff stated that the defendant No. 2 purported to adopt defendant No. 1 under an alleged verbal permission given to her by her late husband, Norendra, at his deathbed, but in fact there was no permission at all, and as such the said adoption was invalid. It was further stated that defendant No. 2, Sarojini, did not perform the necessary ceremonies.

The defendants pleaded, *inter alia*, that the husband of defendant No. 2 gave permission to adopt, and that the necessary ceremonies were duly performed.

It appeared that the suit was valued at Rs. 1,235, and that the Munsif in whose court it was instituted exercised jurisdiction in all suits not exceeding Rs. 2,000 in value.

* Appeal from Appellate Decree, No. 2631 of 1908, against the decree of Sripati Chatterjee, Subordinate Judge of Barisal, dated Aug. 20, 1908, affirming the decree of Jogendra Nath Bose, Munsif of Barisal, dated Jan. 9, 1908.

(1) (1904) I. L. R. 31 Cal. 849.

(2) (1907) I. L. R. 34 Cal. 352.

After the close of the evidence for both sides, the defendants' pleader took an objection that, inasmuch as the relief claimed was not capable of money-valuation, the Court had no jurisdiction to try the suit; and the learned Munsif directed the plaint to be returned. The plaintiff thereupon appealed against that order. The Appellate Court set it aside and remanded the case. After remand, the learned Munsif allowed both the parties to adduce fresh evidence, and upon taking such evidence decreed the plaintiff's suit, holding that the adoption was invalid. On appeal by the defendants to the Subordinate Judge, the decision of the Court of first instance was affirmed.

Against this decision the defendants appealed to the High Court, mainly on the ground that the Munsif had no jurisdiction to try the suit.

Babu Kritanta Kumar Bose, for the appellants.

Babu Mahendra Nath Roy and *Babu Girija Prasanna Roy Chowdhry*, for the respondent.

BRETT AND RICHARDSON JJ. The main point which has been taken in support of this appeal is that the lower Appellate Court erred in law in holding that a suit to set aside an adoption was entertainable by the Munsif's Court. It appears that the suit was valued by the plaintiff at Rs. 1,235, and that the Munsif in whose Court it was instituted exercised jurisdiction in all suits not exceeding Rs. 2,000 in value. In support of the appellant's contention, the decision of this Court in the case of *Aklemannessa Bibee v. Mahomed Hatem* (1) has been relied on. This Court has, however, in the later case of *Jan Mahomed Mandal v. Maschar Bibi* (2), pointed out that the decision in the case of *Aklemannessa Bibi v. Mahomed Hatem* (1) as to the jurisdiction of the Munsif to entertain a suit for restitution of conjugal rights, is an *obiter dictum*. We have studied carefully the judgments of this Court in these two cases, and we are of opinion that the view taken in the latter

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case that the decision in the former case was not one which was necessary for the purposes of disposing of that case, and, therefore, it was an *obiter dictum*, is correct. We see no reason to depart from what appears to have been the practice in this province for a number of years and which has been accepted as the practice in other provinces, and to hold that, for the purposes of jurisdiction, a suit to set aside an adoption is incapable of valuation. The practice has always been that it is competent to the plaintiff to value the relief claimed in his suit, and that valuation has been taken to determine the forum of the Court to decide the suit. In our opinion, therefore, this point taken in support of the appeal fails.

We have gone through the judgment of the lower Appellate Court, and we think that, on the merits as determined by the findings of that Court, the defendants have really no case. We see no reason, therefore, to interfere with the judgment and decree of the lower Appellate Court. We accordingly dismiss the appeal with costs.

Appeal dismissed.

S. C. G.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

DEBIPRASANNA ROY CHOWDHRY

v.

HARENDRA NATH GHOSE.*

1910
May 26.

Hindu Law—Dayabhaga—Ayautuka stridhan—Succession—Property of childless widow—Step-brother—Husband's younger brother.

Under the Dayabhaga law, the younger brother of the husband of a childless widow is entitled to succeed to her *ayautuka stridhan* property in preference to her step-brother.

APPEAL by Debiprasanna Roy Chowdhry and others.

Harendra Nath Ghose and others, the sons of the uterine sister of one Annapurna Dasi, applied for the grant of probate of a will alleged to have been executed by the said Annapurna Dasi, and it was alleged that the testatrix died leaving the following near relations: her adopted son, her husband's younger brothers, and her step-mother's son. Notices were served upon these persons who entered caveats. On the case coming on for hearing, the District Judge held that both sets of objectors ought not to be allowed to contest the validity of the will, as both sets of objectors could not be treated as persons claiming to have an interest; and held further that, during the lifetime of the testatrix' half-brothers, the husband's younger brothers had no interest in the estate and had no *locus standi* to object to any will propounded, and disallowed the objection of her husband's younger brothers. The step-brothers, however, did not contest the proceedings, and the will was proved in the common form and probate was granted to the sons of the uterine sister of the testatrix. The younger brothers of the husband of the testatrix now appealed.

* Appeal from Original Decree, No. 187 of 1909, against the order of F. Roe, District Judge of 24-Parganas, dated Feb. 23, 1909.

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Babu Golap Chandra Sarkar, Babu Ram Chandra Mazumdar and Babu Abinash Chandra Guha, for the appellants.

Babu Braja Lal Chakravarti and Babu Mohini Mohan Chatterjee, for the respondents.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. We are invited in this appeal to set aside an order by which the Court below has overruled an objection taken by the appellants to the grant of probate of a will alleged to have been executed by one Annapurna Dasi, the widow of their deceased elder brother. It appears that upon the death of Annapurna, an application for the probate of her will was made by the respondents, who are the sons of her uterine sister. In the application the nearest relations of the deceased were stated to be the younger brothers of her husband and the sons of her step-mother. Notices were duly served upon these persons, and they entered caveats. When the case came on for trial, the learned District Judge held that both sets of objectors could not be allowed to contest the validity of the will, inasmuch as if either set was held to be entitled to succeed to the estate of the deceased in the event of an intestacy, it must be to the exclusion of the other set; consequently, both sets of objectors could not be treated as persons claiming to have an interest in the estate of the deceased within the meaning of section 69 of the Probate and Administration Act, 1881. In this view the District Judge proceeded to determine whether the younger brothers of the husband of the deceased or her step-brothers would be the preferential heirs in the event of intestacy. He came to the conclusion that the younger brothers of the husband had no interest in the estate in the presence of half-brothers. He therefore held that they had no *locus standi* to take exception to the genuineness of the will propounded, and overruled their objections. Subsequently, the step-brothers did not contest the proceedings with the result that the will was proved in common form, and probate was granted to the sons of the uterine sister of the testatrix. The younger brothers of the husband of the deceased

have now appealed against the order by which their objection was overruled, and, on their behalf, it has been contended that they were preferential heirs to the step-brothers and were entitled to be represented in the proceedings in the Court below. Their claim has been contested on the ground that, under the Dayabhaga school of Hindu law, a step-brother is entitled to succeed to the *ayautuka stridhan* property of a childless woman in preference to the younger brother of her husband. In our opinion, there is no room for reasonable doubt, that the view taken by the Court below is erroneous, and is contrary to the order of succession laid down by Jimutavahana.

In chapter 4, section 3 of the Dayabhaga, Jimutavahana discusses the question of succession of the separate property of a childless woman. The first nine paragraphs of the section deal with the question of succession to nuptial presents and other matters with which we are not at present concerned. Paragraphs 10 to 28 are then devoted to a discussion of the question of succession to *stridhan* property which has been received as a present by a woman after marriage, inclusive of gifts by kindred and *sulka*. The result of the discussion is summarised in paragraph 29, which is in these terms: "Therefore, the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father; but on failure of all these, it devolves on the husband." Thus Katyayana says: "that which has been given to her by her kindred goes, on the failure of kindred, to her husband." Paragraph 30 then explains the text of Katyayana, and it is pointed out that the expression "failure of the kindred" implies absence not merely of the father and mother, but also of brothers. Paragraph 31 commences a discussion as to the order of succession upon failure of the first group of four successive heirs already named, namely, the whole brothers, the mother, the father, and the husband. It may be observed here, in passing, that paragraph 31 has been inaccurately translated by Colebrooke, inasmuch as in his rendering of the text of Vrihaspati, between the mother's sister and the father's sister

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should come, not the maternal uncle, but the maternal uncle's wife and the paternal aunt. The precise effect of the text of Vrihaspati is discussed in paragraphs 32 to 36; and in paragraph 37 it is laid down that the order of succession after the failure of the first set of four successive heirs already named, is as follows: The husband's younger brother, the son of the brother-in-law, the sister's son, the husband's sister's son, the brother's son and the son-in-law. Paragraph 39 then defines the order of succession upon failure of this second set of six successive heirs. The position, therefore, is fairly clear, that while the younger brothers of the husband occupy the first place among the second set of six successive heirs, who come in upon failure of the first set of four successive heirs, the step-brother does not find any place at all in the list up to this stage. A desperate effort, however, has been made by the learned vakil for the respondents to find a place for the step-brother before the younger brother of the husband. The argument is of a twofold character, and is self-contradictory. It has been contended in the first place that a step-brother is included in the expression सोदर (*sodara*) which is used in paragraph 29, and is correctly rendered by Colebrooke as whole brother. It has been argued in the second place, in the alternative, that a step-brother comes before the husband and consequently before the younger brother of the husband. In our opinion, there is not the remotest foundation for either of these positions.

In so far as the first of these contentions is concerned, it is manifestly negatived by the express language of paragraph 29. As was pointed out by this Court in the cases of *Judoonath Sircar v. Bussunt Coomar Roy Chowdhry* (1) and *Ram Gopal Bhattacharjee v. Narain Chandra Bandopadhyaya* (2), paragraph 29 gives the final *résumé* of the various matters discussed in the preceding paragraphs, commencing from paragraph 10. It is not necessary for our present purpose to reproduce the line of elaborate reasoning by which this conclusion was reached by Mr. Justice Dwarka Nath Mitter,—a conclusion which is

(1) (1873) 11 B. L. R. 286;
19 W. R. 264.

(2) (1905) I. L. R. 33 Calc. 315.

supported by the express opinion of three of the commentators on the Dayabhaga. If this be the true scope of paragraph 29, it is obviously not permissible to examine the previous paragraphs to determine whether the conclusion reached by Jimutavahana is or is not legitimately deducible from the texts upon which he placed reliance. In this connection, it is well to bear in mind the warning given by their Lordships of the Judicial Committee in the case of *Collector of Madura v. Mootoo Ramalinga Sathupathy* (1), that the duty of a Judge administering Hindu law is not so much to enquire whether the doctrine disputed is fairly deducible from the earliest authorities, as to ascertain whether it is one that has been received by the particular school of Hindu law which governs the litigant parties. We must, therefore, decline to adopt the course which we are invited to follow by the learned vakil for the respondents, namely, to draw our own inference from an examination of the previous paragraphs, where the expression used is *bhrata* (भ्राता) which, it may be assumed, is ambiguous and may include a half-brother as well as a whole brother. The essence of the matter is that Jimutavahana, when he summarises his conclusion, describes the first amongst the four heirs, not merely as *bhrata* or brother, but as *sodara* or uterine brother. It has not been disputed that the etymological meaning of the expression *sodara* is uterine brother, and the numerous passages quoted in Bohtlingk and Roth's Sanskrit Worterbuch, Vol. VII, col. 1201, do not show that the word is ever used to include a half-brother. On the other hand, the learned vakil for the appellants has pointed out that, according to the well-known Sanskrit lexicographer Hem Chandra, even the term *bhrata* ordinarily means uterine brother, and the six equivalents given by Hem Chandra are all alternative expressions for uterine brother. This view is also strengthened by the definition of Nilkanta, that brotherhood is due to birth from the same mother and father बाह्रत्वमेकपितृमातृजनत्वं (Vyavaharamayukha, Ed. Mandalik, page 80). It is not necessary for us, however, to hold that the word *bhrata* does not include a half-brother,

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and it may be assumed that the context may show that it does ; but the word used by Jimutavahana in paragraph 29 is *sodara*, and in our opinion it is idle to contend that Jimutavahana intended to include a step-brother in the expression *sodara*. Apart from the circumstance that the etymological meaning of the expression directly negatives such a position, it may be observed that if Jimutavahana had intended to include the step-brother in the expression *sodara*, either he or his commentators would have examined the question, which must in that view necessarily arise as to the precise position of the step-brother, namely, whether the step-brother would take along with the whole brother or after him, and in preference to the mother and father. On no conceivable principle can the step-brother be allowed to take equally with the whole brother, or to have precedence over the mother as well as the father. On the other hand, it is clear from paragraph 11, where Jimutavahana comments upon a text of Yajnavalkya, that he intended to include in the term *bhrata*, in that place, the son of both the same mother and father. The first branch of the contention of the learned vakil for the respondents cannot consequently be supported.

In so far as the second branch of the contention of the learned vakil for the respondents is concerned, it is in our opinion equally groundless. His argument in substance is that in paragraph 30, when the husband is described as an heir who takes on failure of the kindred, we must assume that all the kindreds inclusive of the step-brother are intended. In other words, the contention is that the expression *bhrata* in paragraph 30 includes the step-brother. This position is obviously untenable, because paragraph 30 is clearly subordinate to, and explanatory of, paragraph 29, and Jimutavahana could never have intended to define the first three heirs as the uterine brothers, the mother and the father, and then to have held that all kindred had precedence over the husband. If this had been the intention, some provision would have been made for succession amongst the various kindreds. The learned vakil for the respondents suggested that we might apply the doctrine

of spiritual benefit to allow the step-brother to have precedence over the second group of six heirs and also over the husband. In our opinion, such a course is obviously inadmissible. We have a clear specification, first, of one group of four heirs, and next, of a second group of six heirs ; as the step-brother is not one of these, he is clearly not entitled to preference over the younger brother of the husband. Reference has finally been made to the case of *Dasharathi Kundu v. Bipin Behari Kundu* (1), where the question arose as to precedence between the son of a sister and the eldest brother of the husband. The determination of the question raised, turned upon the construction of paragraphs subsequent to those with which we are now concerned, but there is one passage in the judgment of the learned Judges which clearly indicates that they understood paragraph 29 as excluding a half-brother. The case, therefore, does not support the position taken up by the respondents, and the second branch of their contention is, in our opinion, quite as unfounded as the first branch.

The result, therefore, is that this appeal must be allowed, and the order of the Court below discharged. The consequence is that the probate which has been granted in common form will stand revoked, and the propounder of the will will be called upon to prove it in solemn form in the presence of the appellants. The appellants are entitled to their costs in this Court.

Appeal allowed.

S. A. A. A.

(1) (1904) I. L. R. 32 Calc. 261.

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ORIGINAL CIVIL.

Before Mr. Justice Pugh.

In re HALIMA KHATUN.*

1910

June 1.

Mahomedan Law—Wakf property, sanction to sell—Jurisdiction—Practice—Trustees Act (XXVII of 1866) s. 3—Trustees' and Mortgagees' Powers Act (XXVIII of 1866) s. 45—"Cases to which English law is applicable."

On an application made by the *mutwallis* to a *wakf*, for sanction to sell *wakf* property:—

Held, that there being no statute authorising such an application, such sanction could only be obtained by means of a suit.

In the matter of Wootatunnessa Bibee (1) not followed.

Although a Judge of the High Court exercises the functions of a *kazi* when administering Mahomedan law, the procedure to be adopted is to be regulated by the Code of Civil Procedure, and the Rules and Orders of the High Court.

Shama Churn Roy v. Abdul Kabeer (2) and *Nemai Chand Addya v. Golan Hossein* (3) referred to.

Such an application does not come within the purview of Acts XXVII and XXVIII of 1866: these Acts govern only such trusts as are in the form of an English trust and are constituted by persons of purely English domicile, or persons governed by the Indian Succession Act.

In re Kahandas Narrandas (4) and *In re Nilmoney Dey Sarkar* (5) not followed.

APPLICATION.

This was an application by *mutwallis* for the sanction of the Court to sell certain premises which were the subject of a *wakf*.

On the 26th February 1905, one Halima Khatun, a Mahomedan lady governed by the Hanafi school, executed a *wakf-namah*, whereby she dedicated, *inter alia*, the premises No. 31, Park Street in Calcutta, to the purposes of the *wakf* and appointed her sons the *mutwallis*. At the time of this application, the premises consisted of a little over six cottahs of tenanted land yielding a monthly income of Rs. 19, and were

*Ordinary Original Civil Jurisdiction.

(1) (1903) I. L. R. 36 Calc. 21.

(2) (1898) 3 C. W. N. 158.

(3) (1909) I. L. R. 37 Calc. 179, 187.

(4) (1881) I. L. R. 5 Bom. 154.

(5) (1904) I. L. R. 32 Calc. 143.

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valued at Rs. 8,020. The *mutwallis* received an offer, for the sale of the land, of over Rs. 12,400 which they were desirous of accepting, with the intention of investing the proceeds more productively in the purchase of Government securities or of certain other premises in Calcutta.

There was, however, no power of sale or exchange reserved in the *wakfnamah*, and the *mutwallis* consequently, with the consent of Halima Khatun, petitioned the Court for sanction to sell the premises. It was submitted in the petition that the High Court exercised the jurisdiction formerly exercised by the Mahomedan *kazis*, and had the power to grant the sanction.

A question was raised by the Court as to whether the proper procedure had been adopted by applying for sanction on a petition instituted "in the matter of a *wakf*, etc.," instead of by a suit properly framed.

Mr. C. E. Bagram, for the petitioners. The question is purely one of procedure, as to whether the *mutwallis* should have instituted a suit instead of applying on this petition. It has been established, since the judgment of West J. in *In re Kahandas Narrandas* (1), that the procedure is by way of a petition. This authority has been followed: *In re Nilmoney Dey Sarkar* (2), *In the matter of Woozatunnessa Bibee* (3).

[PUCH J. The decision in *In re Kahandas Narrandas* (1) was under the Indian Trustees Act: the *dictum* there was *obiter*, inasmuch as the application was refused. Moreover, it has not been followed in this Court. Woodroffe J. in *In the matter of Woozatunnessa Bibee* (3) expressly refused to make the order prayed for under Acts XXVII and XXVIII of 1866, and relied on *Shama Churn Roy v. Abdul Kabeer* (4), where, however, a suit had been instituted. *In re Nilmoney Dey Sarkar* (2) has been dissented from on several occasions.]

It is submitted this application can be made under section 43 of the Trustees' and Mortgagees' Powers Act.

(1) (1881) I. L. R. 5 Bom. 154.

(3) (1908) I. L. R. 36 Calc. 21.

(2) (1904) I. L. R. 32 Calc. 143.

(4) (1898) 3 C. W. N. 158.

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[PUGH J. That Act has no application to a Mahomedan *wakf*: see section 45.]

Section 45 of this Act is similar to section 3 of the Indian Trustees Act; and the latter Act has been taken to apply to Hindu trusts: *In re Kahandas Narrandas* (1). It is submitted that English law is to some extent applicable to Hindu and Mahomedan trusts. The principles of English Courts of Equity were made applicable to Hindu and Mahomedan trusts by the Act establishing the Supreme Court: and this was confirmed by 24 and 25 Vic. C. 104, sections 9 and 10, and the Charter of 1865, section 19.

PUGH J. This is an application in the matter of a *wakf* executed by Halima Khatun to obtain the sanction of the Court to the sale of a small piece of land in Park Street to Mr. Galstaun at what appears to be a very satisfactory price. On the merits of the application I should have no difficulty, but it is unnecessary for me to express an opinion thereon, because I have come to the conclusion that the matter is not properly before me.

The point involved is really one of procedure, though it involves a question of the jurisdiction of the Court also—the question being whether an order, such as is prayed for, can be made upon a petition intituled *In the matter of a Trust* and without a suit.

There have been conflicting decisions as to the power of the Court to accede to the prayer of a petition such as this, but I am also called upon to refer to a similar, but rather different, question, because the argument in favor of the jurisdiction has been mainly based on a discussion of an earlier question which arose with regard to the orders made, or to be made, under the Trustees Act, and the Trustees' and Mortgagees' Powers Act (Acts XXVII and XXVIII of 1866). The question under those Acts arose in this way. The first of these Acts, by section 3, expressly provides that the Act is only to relate to cases to which English Law is applicable. Act XXVIII in its preamble

(1) (1881) I. L. R. 5 Bom. 154.

states that the Act relates to cases to which English Law is applicable, and section 45 expressly confines the operation of the Act to cases to which English Law is applicable.

In the result, therefore, both Acts only apply to a particular class of cases. What the class of cases was to which the Trustees Act applied was considered in the Bombay High Court by West J. in *In re Kahandas Narrandas* (1); his decision with regard to this matter is to be found on page 170 and the following pages. The application was made to him on petition under the Trustees Act (Act XXVII of 1866), and it was in substance an application to remove a trustee. West J. refused the application on the ground that no case to supersede the trustee had arisen, but he held that the application was properly made to him by petition under that Act, and though the trust with which he was dealing was undoubtedly a Hindu trust, he held that the application was one to which English law applied and was therefore authorized by the Act. He seems to have considered that it was open to the Court, on such an application being made with regard to a Hindu endowment, to consider in each case whether a particular relief sought was the subject of Hindu law or of English law, and he appears to have considered that the matter of appointing trustees was one to which English law was applicable. He says, on page 173, that "English law is applicable in all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not consistently, with the Statutes and the Charter, be employed to subvert the native substantive laws, but they afforded a means of continually ameliorating them;" and he appears to consider that the condition precedent to the applicability of the Act was fulfilled if the application was to be dealt with under some rule introduced as an improvement into the Hindu law from the English law of Trusts. I only observe that if the test, whether such an application is to be made by petition under the Act, be the precise form of relief sought, an undesirable vagueness in practice would be introduced.

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I need not discuss this case in detail, because the finding is in fact an *obiter dictum*, for no case was made on the merits; and, further, the Judges sitting in this Court have consistently refused to follow it except in two instances: *In the matter of Nilmoney Dey Sarkar* (1) and an unreported decision mentioned in the report of that case. Those cases have not been followed, and the former practice has been re-established. With these exceptions, in this Court it has always been held, both before and after these cases, that the Bombay decision was not good law. The cases to which English law applies have always been considered to be cases of trusts in the form of an English trust, and constituted by persons to whom English law or ordinary local law, which is based on English law as distinct from Hindu and Mahomedan law, applies; *i.e.*, persons governed by the Indian Succession Act as well as persons of purely English domicile. If it were necessary to support the established view of this Court, it might be pointed out that it is settled law that in the case of Hindu endowment for the benefit of the family idol the family can, if they choose, by a general agreement and *consensus* of all members, abolish the idol and resume the property, and I wholly fail to see how English law can apply to such a trust even though, while it exists, some of the obligations arising out of such a trust would be enforced in accordance with principles of English law.

It is not very apparent, however, how any argument in support of the present application can be deduced from this doctrine, even if it applied: for, *ex hypothesi*, the foundation of the jurisdiction is statutory, and the whole discussion turns on whether or not the Act by which such an application is authorised applies.

To come to the exact question before me: an application was made to Woodroffe J. in *In the matter of Wooratunnessa Bibee* (2) by petition under these two Acts for sanction by the Court to the granting of a lease of certain premises the subject of a *wakf* by the *mutwalli*. Woodroffe J. declined to make an order under these two Acts in accordance with the established

(1) (1904) I. L. R. 22 Cal. 142.

(2) (1906) I. L. R. 35 Cal. 21.

practice of this Court, but he made an order as *kazi* under the Mahomedan law on the authority of the case of *Shama Churn Roy v. Abdul Kabeer* (1). I should have considered that judgment binding on me, but for the fact that I was informed by counsel that Fletcher J. on a subsequent similar application declined to make an order. I have ascertained that this is so, and that he refused the application on the ground that there being no statutory authority authorising such an application to be made to the Court on petition, it could only be done by means of a suit. It, therefore, becomes necessary for me to consider and express my opinion as to which of these decisions I ought to follow. It is purely a matter of procedure, because there is no question that a Judge of this Court does exercise the functions of a *kazi* in such matters. That is clearly laid down in the case of *Nimai Chand Addya v. Golam Hossein* (2). It has been argued that, inasmuch as Mahomedan law relating to endowments has been preserved by virtue of 21 George III, Chapter 70, sections 17 to 19, and inasmuch as the *kazi* was able to make these orders, this Court, administering justice in place of a *kazi*, should make such orders when applied for. The difficulty I have in assenting to this argument is that, although provision is made for the application of Mahomedan law in certain matters, there is no provision by which Mahomedan procedure is introduced into this Court. There is, therefore, no basis for following the procedure under which justice was administered by the *kazi*. The procedure of this Court is regulated by its own Orders and Rules and the Code of Civil Procedure, and even, when administering Mahomedan law, this Court does not vary its practice with regard to Mahomedan cases. If it were to do so, many curious positions might arise. For example: if two Mahomedans were litigants, and one called a number of English and Hindu witnesses while the other relied on his own testimony, it would apparently be obligatory to apply the rule of Mahomedan law, that if a devout Mahomedan has sworn to a certain fact upon the *Koran*, his evidence must be accepted in preference to that of any

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(1) (1898) 3 C. W. N. 158.

(2) (1909) I. L. R. 37 Calc. 179, 187.

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infidel. I need not say that that rule of Mahomedan law does not apply to this Court. I agree with the view taken by Fletcher J. that the Court cannot deal with this matter unless it is brought before it by means of a suit, there being no statute authorising the matter to be brought in any other way. Whether facilities for such applications in both Mahomedan and Hindu cases should be given will no doubt be considered if, and when, new rules are made by this Court under the powers given by the Civil Procedure Code to introduce procedure by way of originating summons. It has been argued that the old Supreme Court was made, by section 18 of the Charter of 14 George III, 1774, a Court of Equity and was directed to administer justice in a manner as nearly as might be the same as the High Court of Chancery, and that this Equity Jurisdiction of the Supreme Court was preserved by the subsequent Letters Patent of 1862, section 18, and 1865, section 19, and consequently such an application could be made in this way. I assert to the first part of this argument, but I do not think that it assists Mr. Bagram, for in the old Equity Courts every proceeding was initiated by a bill which was equivalent to a suit. It was necessary to have a bill for purposes of discovery and also for the purpose of reviving a suit which had abated by death of a party. I think any argument deduced from the procedure of the Court of Chancery would tend to destroy, rather than support, the contention that I have any jurisdiction to deal with this matter without a suit being filed. I regret to have to come to this conclusion, because I think that the jurisdiction to make such orders, if it existed, would be a beneficial jurisdiction and would save expense. I am, however, quite clear that it is not beneficial to make such orders unless the jurisdiction to do so is clearly established. In this city, orders of the Court are accepted and acted on by conveyancers practically without question. No one investigates the jurisdiction of the Court to make orders as practitioners under a more exact system in England would do. It would be most regrettable if, after the Court had made such an order and a mortgagee or purchaser had dealt with property on the faith

of such an order, the validity of the order was questioned in a suit, and the Court was compelled to hold that the original order was made without jurisdiction and was therefore invalid. Though I have been much pressed to make this order, and the intending purchaser is said to be willing to act upon such an order if made, I think it is really to his interest that no order should be made which might be contested or questioned afterwards, and that he should be protected by an order properly made in a suit. If a suit is filed, it will be necessary to consider the question raised by Mookerjee J., but not decided, in *Nemai Chand Addya v. Golam Hossein* (1), as to whether the *kazi* could and the Court can authorize a sale of *wakf* property. I should wish to hear the question argued before expressing an opinion about it, but I may say that at present I do not associate myself with Mookerjee J.'s doubt on the subject, and speaking off-hand, I imagine that so many such orders have been obtained in suits on the Original Side of this Court that the power to make a decree granting sanction is not open to question by one Judge on the Original Side. There will be no order on this application for the reasons already given.

Attorney for the petitioners : *K. L. Bural*.

J. C.

(1) (1909) I. L. R. 37 Calc. 179, 187.

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APPELLATE CRIMINAL.

Before Mr. Justice Harington and Mr. Justice Teunon.

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v.

PRAMATHA NATH BOSE.*

False Evidence—Deposition under compulsion—Privilege—Incriminating statements in cross-examination made by a party to a suit after objection taken, not by deponent personally, but by his pleader—Admissibility of the statements on subsequent trial for giving false evidence—"Compelled to answer"—Evidence Act (I of 1872) s. 132, proviso.

An incriminating statement in a deposition made by a party to the suit in cross-examination in answer to questions relevant only as affecting his credit, and objected to, not by the deponent himself but by his pleader, is not admissible against him on his subsequent trial for giving false evidence, he being in fact "compelled to answer" within the meaning of section 132 of the Evidence Act.

Such objection may be taken by counsel or pleader representing the party.

Thomas v. Newton (1) and *Rex v. Adey* (2), distinguished.

Queen v. Gopal Dass (3), explained and distinguished.

Per TEUNON J. When such an objection has been taken and overruled, if any objection or privilege personal to the witness remains, it is still open to him to assert that objection or claim that privilege.

THE accused filed a verified written statement, on the 12th November 1907, as a defendant in suit No. 462 of 1907 on certain hand-notes, in the court of the Subordinate Judge of Burdwan, which suit was transferred to the Additional Subordinate Judge, denying having borrowed money on two hand-notes, and alleging that they were forgeries. The suit was, however, decreed against him on the 26th August 1908. There was another suit pending against him, No. 451 of 1907, in the same Court upon another hand-note. At the hearing of the latter, he

*Government Appeal No. 3 of 1910 against the order of E. Panton, Sessions Judge of Burdwan, dated Nov. 27, 1909.

(1) (1827) 1 Moo. & M. 48n.

(2) (1831) 1 Moo. & Rob. 94.

(3) (1881) 1 L. R. 3 Mad. 271.

was examined as a witness, and admitted, on the 28th August, on being questioned in cross-examination, that he wrote the hand-notes which were the subject of suit No. 462, and that he had borrowed the amounts mentioned therein. The accused did not himself decline to answer the questions, which were relevant only as affecting his credit, but his pleader objected to them on his behalf, though in spite of such objection the questions were allowed, and the accused then made the statements referred to. The plaintiffs, in suit No. 462, thereupon applied for sanction to the Additional Subordinate Judge to prosecute the petitioner under section 193 of the Penal Code, but the application was refused. They then appealed to the District Judge of Burdwan, Mr. Peterson, who granted the sanction on 11th May 1909. A complaint was then made before Babu Modeswar Singh, Deputy Magistrate of Burdwan, against the accused, and he was tried and convicted under section 193 of the Penal Code on the 28th September. He appealed against the order to the Sessions Judge, Mr. E. Panton, who, by his order dated the 27th November, acquitted him on the ground that his deposition of the 28th August 1908 was not admissible against him, under the proviso to section 132 of the Evidence Act, on the subsequent trial for giving false evidence, and that, apart from it, the other evidence was insufficient to establish the falsity of the allegations in the written statement of the 12th November 1907. The Local Government now appealed against the order of acquittal.

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The Deputy Legal Remembrancer (Mr. Orr), for the Crown.
Babu Dasharathi Sanyal and Babu Haradhan Chatterjee, for the accused.

HARINGTON J. This is an appeal against the order of the Sessions Judge of Burdwan setting aside on appeal the conviction and sentence passed on one Pramatha Nath Bose who was convicted of an offence under section 193 of the Indian Penal Code by the Deputy Magistrate of Burdwan. The facts are [that the defendant verified and filed a written statement in

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suit No. 462 of 1907. In suit No. 451 of 1907 the defendant gave evidence and was cross-examined with a view of showing that certain statements he had made in the written statement he had verified and filed in suit No. 462 of 1907 were false. He admitted they were false, and on the strength of that admission he was prosecuted and convicted before the Deputy Magistrate.

The learned Sessions Judge set aside the conviction on the ground that, under the proviso to section 132 of the Evidence Act, the answers given in cross-examination at the trial of suit No. 451 of 1907 could not be proved against him on a charge of having made false statements in the verified written statement he filed in suit No. 462 of 1907.

For the Crown it is contended that the answer was not one the witness was compelled to give, and, therefore, that the proviso to section 132 does not apply.

There is nothing on the record to show that any objection was taken when the questions, on which the admissions were elicited, were put. It is conceded that the witness did not himself refuse to answer, but there was evidence that his pleader objected when the questions were put, but the objection was overruled, and this evidence the learned Sessions Judge accepted as true.

It must be taken, therefore, that the question was objected to, and that the witness answered after his objection had been overruled. The question is, when a witness answers under such circumstances, has he been compelled to answer.

It is contended for the Crown that the objection to answer must come from the witness, and that an objection taken by counsel or pleader must be disregarded, and in support of this proposition two cases tried by Lord Tenterden, *Thomas v. Newton* (1) and *Rex v. Adey* (2), were cited.

I very much doubt whether the strictness which obtained in Lord Tenterden's time would be enforced in these days, but even if it were, I think the cases are distinguishable from the present. In those days the parties were not competent witnesses. The objection, therefore, must have been taken by

(1) (1827) 1 Moo. & M. 48n.

(2) (1831) 1 Moo. & Rob. 94.

counsel, not on behalf of his client, but on behalf of a witness for whom he had no authority to act. It may well be, therefore, that while counsel could not be heard to assert the privilege of a witness for whom he is not appearing, he might be heard to assert the privilege of a party whom he is authorized to represent.

In my opinion the objection may be taken by counsel or pleader, and the cases tried before Lord Tenterden do not apply.

The deposition has not been taken in the form of question and answer, so we have not before us the precise form of the question and the answer; but, inasmuch as the result of the questions was to elicit an admission that the defendant had made a false statement in a verified written statement in another case, I take it that the questions must have been framed under section 146 (3) of the Evidence Act for the purpose of shaking the witness's credit and injuring his character—for the questions were not relevant to any issue in suit No. 451 of 1907, except in so far as they went to the defendant's credit.

Now, the questions being questions only relevant as affecting the credit of the defendant, and the defendant having by his pleader objected, it became the duty of the Court under section 148 to determine whether the defendant should be compelled to answer the question or not.

In my opinion, in overruling the objection made, the Court decided that the question was one which the witness must answer, because it appears to me idle to say that, having overruled the defendant's objection to answer the question, the Court can say the question is one which the defendant is under no obligation to answer.

The point was considered in the case of *The Queen v. Gopal Doss* (1) by a Full Bench of the Madras High Court, and there was a difference of opinion between the Judges composing the Bench. In that case Salem sued Gopal and Vallaba on a promissory note for Rs. 1,000 under Chapter XXXIX of the Civil Procedure Code. Gopal and Vallaba made affidavits in order to get leave to defend. Gopal denied his signature: the

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plaintiff proceeded against Vallaba only. Vallaba, when examined on his own behalf, said that he wrote both signatures on the note at the instigation of Salem, the plaintiff, and received Rs. 100, a ring, a watch and some muslin for doing this. Judgment was given for the plaintiff Salem against Vallaba. On this Gopal prosecuted Salem and Vallaba, the latter for forgery and fraudulently using a false document, and the affidavit made by Vallaba and the deposition he gave in the suit were admitted in evidence against him. The question arose whether they were properly admitted. The affidavit was clearly voluntary : there was no obligation on Vallaba to ask leave to defend, nor was he in any way compelled to make any of the statements which he made in the affidavit. Then the statements which he made in the deposition, to the effect that he had forged the note, appear to have been made in examination-in-chief as a defence to the plaintiff's claim. This distinguishes the Madras case from the present one, for a statement made by a defendant in examination-in-chief, as an answer to the plaintiff's claim, stands on quite a different footing from an admission obtained from a defendant in cross-examination after objection to the question has been taken by the defendant's counsel.

It is unnecessary to discuss the distinction between answers given by a party giving evidence on his own behalf to questions put by his counsel, and answers elicited from him in cross-examination by counsel for the other side, for in this case the questions were objected to.

In the present case the party, after giving evidence in his own behalf in chief, was cross-examined by the opposite party, and questions were put suggesting the commission of a criminal offence. This was objected to by the pleader for the party to whom the questions were put. The objection was overruled, and the party thereupon became bound to answer.

On these facts he was, in my opinion, "compelled to answer" within the meaning of section 132 of the Evidence Act, and the answers cannot be used against him when he is prosecuted for the offence which he admitted in those answers. In my opinion the appeal should be dismissed.

TEUNON J. The facts of this case have been clearly stated in the judgment of my learned brother and need not be again set out. The sole question in the appeal is whether the incriminating answers, of which the Crown sought to make use against the accused, were answers which the accused, as a witness under cross-examination, had been "compelled" to give within the meaning of section 132 of the Evidence Act.

It has been suggested in argument that the proviso to section 132 of the Evidence Act protects every statement made by a witness. As at present advised, I am unable to accede to this contention, and am of opinion that the sections draw a distinction between statements voluntarily made and answers given under constraint from the Court after objection taken. In this view I am supported by the case of *Queen v. Gopal Doss* (1) and *Moher Sheikh v. Queen-Empress* (2).

I am, further, not prepared to assent to the contention that when an objection, whatever its nature, has been taken and has been overruled, the witness is thereby compelled to answer. It appears to me that in general, when overruling an objection to a question, the Judge decides merely that as between the parties to the suit the question is admissible; when the question is thereafter put to the witness, if any objection or privilege personal to the witness remains, it is still open to him to assert that objection or claim that privilege.

In the present case it is conceded that the accused did not, by his own mouth, claim any privilege or make any objection, but it has been found—and I think properly found—that the pleader who represented him in the suit in which he was examined, did, in fact, object to the questions now under consideration, and that the objections taken were overruled. We have then, in my view, to determine, *first*, the nature of the objection taken; and, *secondly*, if the objection was one framed with regard to the provisions of section 132 and section 148 of the Evidence Act, whether it was sufficiently taken by the witness now the accused.

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(1) (1881) I. L. R. 3 Mad. 271.

(2) (1893) I. L. R. 21 Calc. 392.

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With regard to the second point, it has been contended on behalf of the Crown that the objection must come from the witness himself, and in support of this proposition the cases of *Thomas v. Newton* (1) and *Rex v. Adey* (2) have been cited. It is by no means clear that this rule of English law has been extended to India, and there appears to be no Indian authority on the point. In the present case it is, however, unnecessary to decide whether, in the case of witnesses in general, objections of this nature may or may not be taken on their behalf by counsel or pleaders appearing in the suit. In the suit in which the accused was examined as a witness, he was himself the defendant, and the objection taken was taken on his behalf by the pleader who represented and acted for him. In this state of facts, if it be found that the objection taken was in fact an assertion of the witness's privilege in respect of incriminating answers, there was, in my opinion, a sufficient assertion of the privilege by the witness.

We have then to determine the nature of the objection taken. It is to be regretted that no record of the objection was made by the Judge who tried the original suit, and that the exact terms of his objection were not ascertained from the pleader when under examination in the criminal proceedings. It is, however, clear that under the provisions of section 146 of the Evidence Act the questions were relevant or admissible, and it is further clear that they were relevant only in so far as they affected the credit of the witness by injuring his character. Now, under the provisions of section 148 of the Act, when questions are relevant only as affecting character, it is in the discretion of the Court to compel an answer or to excuse the witness. In this state of facts, no other possible objection to the questions appearing, I am of opinion that I ought to presume and to hold that the objections taken on behalf of the witness were in fact objections framed with regard to the provisions of section 148 of the Evidence Act, and that in overruling those objections the Court, in the exercise of its discretion, decided that the witness must and was bound to answer.

(1) (1827) 1 Moo. & M. 48n.

(2) (1831) 1 Moo. & Rob. 94.

In this view, I am of opinion that in the present case the witness was in fact compelled to answer within the meaning of section 132 of the Evidence Act, and that, under the proviso to that section, the answers could not be proved against him in the criminal proceedings. For these reasons I agree in dismissing the appeal.

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Appeal dismissed.

PRIVY COUNCIL.

DAMODAR DAS

v.

LAKHAN DAS.

P.C.*
 1910
 March 2;
 June 7.

[On appeal from the High Court at Fort William in Bengal.]

Limitation—Adverse possession—Dispute between senior and junior chelas as to succession to Hindu maths—Ekrarnama allotting one math to senior chela in perpetuity and the other to junior chela as adbhikari—Suit instituted within twelve years from senior chela's death, but 27 years from date of ekrarnama—Hindu Law—Endowment.

The Mohant of the temple of a Hindu idol who was in possession of two *maths*, one at Bhadrak and the other at Bibisarai, died leaving two *chelas*, or disciples, between whom a controversy arose as to the right of succession to the *maths* and the property annexed to them. The dispute was settled by an arrangement embodied in an *ekrarnama*, dated 3rd of November 1874, executed by the senior *chela* in favour of the junior *chela*, by which the *math* at Bhadrak was allotted in perpetuity to the senior *chela* and his successors, while the *math* at Bibisarai and the properties annexed to it were allotted to the junior *chela* (described therein as an *adbhikari*) and his successors for the purposes connected with his *math*, subject to an annual payment of Rs. 15 towards the expenses of the Bhadrak *math*. Less than twelve years after the death of the senior *chela*, but considerably more than that period after the date of the *ekrarnama*, the appellant, the successor of the senior *chela*, brought a suit against the junior *chela* to recover possession of the properties annexed to the Bibisarai *math*, on the allegation that they were *debutter* property dedicated to the worship and service of the plaintiff's idol, and held by the respondent (representing the junior *chela*) as an *adbhikari* in charge of the Bibisarai *math*, and asserting it to be a *math* subordinate to the Bhadrak *math* :—

Held (affirming the decision of the High Court), that the property dealt with by the *ekrarnama* was, prior to its date, to be regarded as vested not

* Present : LORD MACNAGHTEN, LORD COLLINS, and SIR ARTHUR WILSON.

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in the Mohant, but in the idol, the Mohant being only its representative and manager, and consequently that from the date of the *ekrarnama* the possession of the junior *chela*, by virtue of its terms, was adverse to the right of the idol, and of the senior *chela* as representing that idol, and that the suit was barred by limitation.

APPEAL from a decree (6th June 1905) of the High Court at Calcutta, which reversed a decree (30th September 1902) of the Subordinate Judge of Cuttack.

The plaintiff was the appellant to His Majesty in Council.

The suit out of which this appeal arose was brought on 17th July 1901 to establish the plaintiff's right to, and to recover possession of, a *math* called the Bibisarai *math* and property appertaining thereto, situated in pergunnah Jajpur in the district of Cuttack, as belonging to the Thakur or idol Sri Gopal Jiu, and as such being part of the endowed property of the Bhadrak *math* in the district of Balasore of which the plaintiff was the Mohant.

The plaintiff alleged that Sriram Das, his *guru* and predecessor in the mohantship of the Bhadrak *math*, had, on succeeding to that office, a dispute with the defendant, who claimed to be the successor to the mohantship; that litigation ensued which was eventually settled, at the instance of some of their mutual friends, by an agreement with the defendant, the terms of which were set forth in *ekrarnamas* executed by Sriram Das and the defendant on the 3rd November 1874, whereby the *math* and properties at Bibisarai were to be held by the defendant as an *adhiikari* or manager subordinate to the Bhadrak *math*; and that the defendant had ever since so held them. The plaintiff further stated that Sriram Das died on 18th July 1889; that he had succeeded Sriram Das as Mohant of the Bhadrak *math*; and that the *ekrarnama* executed by Sriram Das being null and void as against him, he was entitled to possession of the Bibisarai *math* and the property appertaining to it. He alleged his cause of action to have accrued on the death of Sriram Das.

The defence set up was that the suit was barred by limitation, as neither the plaintiff nor his predecessor had been in

possession of the disputed property within twelve years previous to the institution of the suit. The defendant denied that Sriram Das had died on 18th July 1889, as alleged by the plaintiff, and stated that he had been in adverse possession of the properties in suit from the 3rd November 1874, and had thereby acquired an absolute right in respect of the disputed properties, and that the alleged rights of the plaintiff and his predecessor, Sriram Das, had become extinguished.

Issues were raised on the questions raised by these pleadings.

It was established by the evidence adduced by the plaintiff, and found as a fact by both Courts in India, that Sriram Das died on the date alleged in the plaint: and it was also established that the Bibisarai property in dispute had for a long period of time been a part of the *debutter* estate of the idol Sri Gopal Jiu, and was appurtenant to the Bhadrak *math*, and that the management of the Bibisarai *math* and property had been in the hands of an *adhikari* or agent appointed by, and subordinate to, the Mohant of the *math* at Bhadrak, the *shebait* of the said idol.

As the defendant, when called upon, did not produce the *ekrarnama*, dated 3rd November 1874, which the plaintiff alleged was executed by Sriram Das in the defendant's favour, a certified copy of it, procured from the Registration office, was put in evidence by the plaintiff. This document recited that Sriram Das's *guru*, Mohant Kripasindhu Das, died in 1275 (1868), and that he (Sriram Das) was thereupon installed as Mohant, and had been ever since "maintaining the sheba and puja of the said Thakur, and performing the duties of Mohant without interruption;" that his co-disciple Lakhan Das, "the younger disciple of my deceased *guru*, had commenced litigation in *formâ pauperis* for recovery of the mohantship;" and that certain of their friends, in the capacity of arbitrators, had made a settlement of their disputes in the manner set forth in the following paragraphs:—

"1st. Subordinate to this *math* there is, within the areas of mouzahs Bibisarai and Dasatatar in pergunnah Jajpur, a *math* known as Bibisarai *math*. On the death of Mohant Ramayan Das, the founder of the *math* at Bhadrak, his elder *chela* (disciple), Ram Ratan Das, became the Mohant, and the younger

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math, Pursotum Das, founded the *math* at Bibisarai and acquired some lands as *debutter* of the said Thakur of the Bhadrak *math*. and set up, as substitutes of the said Thakur, the images of the Thakur Gobind Jiu and Bala Jiu, and remained in possession and occupation of the sheba, puja of the said Thakurs. On his death, Ganga Ram Das, the younger disciple of the said Ram Ratan Das, and co-disciple of my *guru's guru*, Mohant Narayan Das remained in possession as appointed by Pursotum Das. On his death, his disciple, Mohan Das, having preferred a claim in his own right, his possession was put a stop to under a decision of the Civil Court, and the said *math* has been held in possession as subordinate to the *math* at Bhadrak. Henceforth Lakhan Das aforesaid shall, under the title of *adhi-kari*, remain in possession and enjoyment of the said *math* as subordinate to the Bhadrak *math*, and of the undermentioned 351 mâns, 10 gunts, 5 biswas of released and resumed lands appertaining thereto, in the same manner as the younger disciples of the former Mohant held and enjoyed the said *math*. and shall continue to perform the sheba, puja and jani-jatra (festivals) of the said Thakurs Gopal Jiu and Bala Jiu established in the said *math*.

"2nd. I and my heirs shall have no right to remove *adhi-kari* Lakhan Das and his heirs from the possession of the said *math* and the lands appertaining thereto and subordinate to the Bhadrak *math*: and the said *adhi-kari* shall not be competent to exercise his own authority, and he shall not be able in any way to transfer to any one the said *math* and the lands appertaining thereto.

"3rd. That in order to show the subordinateness of the said Bibisarai *math* to the *math* at Bhadrak, the said *adhi-kari* shall, as a token of respect, pay annually a sum of Rs. 15 for the expenses of the Thakur at the Bhadrak *math*, and if he neglects to pay this money and allows it to fall into arrears, then I and my heirs shall bring some lands under attachment and collection of the Bhadrak *math*, a portion of the lands appertaining to the said *math* sufficient for the realization of the arrears, and after realizing the arrears restore the land to his possession. If there be any business or a litigation in connection with *math* at Bhadrak, the said *adhi-kari* shall, according to my direction, be present on the occasion, and shall appear at the *math*, or at any other *darbar*, or before any officer and manage the business."

Then it is stated that—

"We, both the co-disciples, regarding the said settlement made by the gentlemen as the decision and order of the High Court, shall act up to the same in every respect. We now think it proper to get the suits pending in the Civil Court decided according to the said settlement and have them struck off. *Adhi-kari* Lakhan Das also has executed a separate *ekrarnama* in favour of me, Mohant Sriram Das, in token of admission of this *ekrarnama* of settlement. For this purpose I, Mohant Sriram Das, have put *adhi-kari* Lakhan Das aforesaid in possession and enjoyment of the aforesaid *math* Bibisarai and the lands appertaining to the said *math* valued at Rs. 2,000, and have made over to him the images of the God Gopal Jiu and Bala Jiu, and I declare and give out in writing that I fully agree to this settlement *ekrarnama*. In future, neither I nor any of my heirs shall have any right or power to act contrary to this settlement *ekrarnama* in any way. If we do anything to the contrary the same shall be inadmissible."

It was established by the evidence that the defendant was put into and held possession of the property in suit at Bibisarai as such *adhibikari*, that being his description given in applications for registration of his name in the Collectorate Register (Exhibits 10, 11 and 12, dated 20th February 1877); and in the particulars given in those applications he mentioned the settlement of litigation between himself and Sriram Das by the *ekrarnama*, dated 3rd November 1874, "according to which," he said, "I obtained the lands in question along with other lands for the expense of the Thakurs Sri Gopal Jiu and Bala Jiu, established at Bibisarai," though he says he held them "by right of inheritance to the share of a brother in ancestral property."

In the course of the trial the defendant repudiated all knowledge or connection with the *ekrarnama*, maintaining that he had never admitted its existence, that its execution had never been proved, that it ought not to have been admitted in evidence against him, and that he had held the property throughout adversely to the Mohant at Bhadrak and had an absolute right thereto. He did not appear to give evidence at the trial.

The Subordinate Judge held that Sriram Das having died on 18th July 1889, as alleged by the plaintiff, the suit was not barred by limitation; that the defendant had obtained possession under the *ekrarnama*, and the onus lay on him to show how and when that possession became adverse to the Mohant of the Bhadrak *math*—an onus he had not discharged; that the *ekrarnama* could not be admitted in evidence unless satisfactory proof of its execution by Sriram Das was adduced, and no such proof had been given; and that there was no evidence of adverse possession. On the third issue (as to adverse possession) the Subordinate Judge said:—

"Had the transfer of the disputed property been void *ab initio*, it could have been contended, on the authority of the Privy Council ruling in *Gnanasambanda Pandara Sannurthi v. Velu Pandaram* (1), that the transferee was a trespasser, and that his period of adverse possession commenced from the date of the transfer. But it has been held, in the case of *Arruth Misser v. Juggurnath Indraswamee* (2), that a *shebait* has got life interest, and that a lease of the endowed

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property given by him is valid to the extent of his life. Consequently, the transfer by Sriram Das was valid to the extent of his life, and was not void *ab initio*.

"The defendant ought to show when and how his adverse possession commenced. He got it by an *ekrarnama* which he suppresses and ignores. Before the defendant can be allowed to take shelter under the plea of adverse possession, he must show that he ever denied the title of the Mohant of the Sadabrata *math*. On the contrary, the defendant in his verified petitions, Exs. 10, 11 and 12, filed in the Land Registration Department, distinctly admits that an *ekrarnama* was executed between him and Sriram Das on the 3rd of November 1874 in order to avoid a ruinous litigation, and that he got the properties under that deed. If the defendant now chooses to throw the *ekrarnama* overboard, he must show what overt act was done by him from which it can be inferred that he meant to hold the land adversely to the Mohant of the Sadabrata *math*. The plaintiff's right of action accrued when his *guru* died within twelve years before this suit, and consequently I am of opinion that the plea of adverse possession cannot be successfully pleaded against him.

"The defendant does not produce the *ekrarnama* when called upon to do so, nor does he come forward to deny its existence on oath. A copy of the *ekrarnama*, taken from the Registry Office, has been admitted to prove its existence and contents. It is urged by the defendant's pleader that the contents of this document cannot be used as evidence against his client, unless it be proved that Sriram Das executed it. As the document is not 30 years old, I am of opinion that even if the original had been before the Court it could not have been used as evidence unless its genuineness was legally proved. The copy of the deed cannot stand upon a higher footing. But there is the evidence of Madhusudan Mahanti that the executant and all the attesting witnesses of the *ekrarnama* are dead. The original not having been produced by the defendant, no witnesses can be called to prove the signature of the attesting witnesses. Madhusudan Mahanti, however, says that he was present when the *ekrarnama* was executed, and on hearing the copy read out to him, says that this was the *ekrarnama*. This witness was not cited from before. He was present in Court on his own business, when he was brought into the witness-box to remedy this defect in the plaintiff's case. There is no guarantee that this witness was present at the time, and I cannot rely upon his allegation of having seen the execution of the document. The plaintiff cannot, therefore, take advantage of the recital in the *ekrarnama* that the defendant was to hold the Bibisarai *math* as a dependency of the Sadabrata *math*, and to pay a homage of Rs. 15 per year.

"As I have found that the defendant's possession was not adverse to the plaintiff's *guru*, or to the plaintiff, the defendant cannot be said to have acquired an absolute title by adverse possession."

A decree was therefore made in favour of the plaintiff for possession of the property in suit.

On appeal, the High Court (Rampini and Caspersz, JJ.) said :—

The plaintiff, in support of the decree of the lower Court, has contended that the *ekrarnama* should have been admitted in evidence. We are of opinion

that it should have been so admitted and presumed to have been duly executed. It is beyond question that, in November 1874, serious disputes had broken out between the defendant and the Mohant Sriram Das. They were both *chelas* of the former Mohant Kripasindhu Das. They claimed a right to succeed to the two *maths* at Bhadrak and Bibisarai. It was arranged between them that Sriram Das should continue in possession of the Bhadrak *math* and the defendant of the Bibisarai *math*. *Ekrarnamas* to this effect were exchanged between them. Now, the defendant has been called on to produce the *ekrarnama* made over to him. He has not produced it. A certified copy has been obtained from the Registration Office, and one witness, Madhu Sudan, has deposed to its execution. Most, if not all, of the attesting witnesses have been proved to be dead. This person, Madhu Sudan, may not be a very credible witness, but, under section 89 of the Evidence Act, it may be presumed, in the circumstances, that the deed was duly executed. There is no possible reason why we should have any hesitation in making this presumption. Now, if the plaintiff claims to be the successor of Sriram Das, he certainly cannot recover the Bibisarai *math*, for the *ekrarnama* provides that neither Sriram Das nor any of his heirs shall ever disturb the possession of the defendant in the Bibisarai *math*. On the other hand, if the plaintiff sues merely as the trustee of the idol, to whom the two *maths* in strict legal intentment belong, he is met by the plea of the defendant's adverse possession of 27 years. We think there can be no doubt that the defendant held the disputed *math* adversely for more than twelve years, even before the death of Sriram Das. This is apparent from Exhibits 10, 11 and 12, in which the defendant claimed, in February 1877, to hold the *math* by right of inheritance, though he admitted that possession was made over to him under the *ekrarnama* of 1874. Sriram Das died in July 1899, more than twelve years after the above claim. Furthermore, it would appear, from the Privy Council decision in the case of *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (1), that the plaintiff and his preceding *shebaitis* are not in the position of the holders of life estates, and that the plaintiff is not entitled to contend that his right to sue accrued to him only on the death of Sriram Das, and that the possession of the defendant, which may have been adverse to Sriram Das, was not adverse to him. The decision of the Privy Council, above alluded to, is of higher authority than the ruling of this Court in *Arruth Misser v. Juggurnath Indraswamee* (2), on which the Subordinate Judge relies. Moreover, this Court in a comparatively recent case, *Nilmoney Singh v. Jagabandhu Roy* (3), has affirmed the principle laid down by their Lordships of the Privy Council in the decision above referred to, and has held that each succeeding manager or *shebait* of an idol does not get a fresh start, as far as the question of limitation is concerned, on the ground of his not deriving title from any previous manager. The ruling in this case is further direct authority for holding that the possession of the defendant has been all along adverse, and bars the plaintiff's claim, and the decision in *Beejoy Chunder Bannerjee v. Kally Prosonno Mookerjee* (4) also supports this view."

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(2) (1872) 13 W. R. 439.

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(3) (1896) I. L. R. 23 Cal. 536.

(4) (1878) I. L. R. 4 Cal. 327.

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The High Court therefore reversed the decision of the Subordinate Judge and dismissed the suit.

On this appeal, which was heard *ex parte*,

A. M. Dunne, for the appellant, contended that the High Court was wrong in deciding that the suit was barred. The appellant's case was that the property in dispute, being a part of the *debutter* property of the Thakur, could not be validly assigned or dealt with by the Mohant Sriram Das so as to affect the right of the Thakur, and that in any event no such dealing with it could be operative beyond the lifetime of Sriram Das, and that, therefore, on his death, the *ekrarnama* and arrangements made thereunder lapsed and became ineffective. The suit having been instituted within twelve years from the date of Sriram's death was, it was submitted, not barred by lapse of time. Reference was made to *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (1) and *Nilmoney Singh v. Jagabandhu Roy* (2), the latter case being distinguished on the ground that the facts of it were entirely different from the present case.

The *ekrarnama* was rightly admitted in evidence, and its effect was to show that Sriram Das was accepted by the respondent as the Mohant of the Thakur at the Bhadrak *math*, and that as such Mohant he agreed to and did appoint the respondent to a subordinate position as an *adhikari*, or manager, or agent, to be in charge of the subordinate *math* at Bibisarai, and to act in all matters of business under the orders and directions of the Mohant at Bhadrak.

The evidence in the case clearly established the title of the Thakur of the Bhadrak *math* as proprietor of the property in suit; and the terms of the *ekrarnama* did not confer upon the respondent any rights beyond those of a manager and agent of properties belonging to the Bhadrak Thakur, and subordinate to the Mohant of the Bhadrak *math*. Any rights granted to him under the *ekrarnama* came to an end on the death of Sriram Das. There was no evidence of adverse pos-

(1) (1899) I. L. R. 23 Mad. 271 :
 L. R. 27 I. A. 69.

(2) (1896) I. L. R. 23 Calc. 536.

session. The respondent took possession under the *ekrarnama*, and, if so, it was for him to show how and when his possession became adverse to the Thakur. This he had not done.

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The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a decision of the High Court of Calcutta, dated the 6th June 1905, which overruled that of the Subordinate Judge of Cuttack, dated the 30th September 1902.

June 7.

The suit out of which the appeal arises was filed in the last-mentioned Court by the plaintiff appellant in his character as Mohant of the *math* or temple of a Hindu deity at Bhadrak in Balasore, and the object of the suit was to recover possession of certain properties situate at Bibisarai in Jajpur, the suit being based upon the allegation that the properties were *de-buttar* property, dedicated to the worship and service of the plaintiff's Thakur, and held by the defendant as an *adhikari* in charge of what was said to be a subordinate *math* of Bibisarai.

The first Court decided in favour of the plaintiff. That decision was reversed on appeal by the High Court on the ground that the plaintiff's suit was barred by limitation. Their Lordships are of opinion that the learned Judges of the High Court were right.

There is now no dispute as to any question strictly of fact. The former Mohant was in possession of both *maths* and of the property annexed to them. He died, leaving two *chelas*, between whom a controversy arose as to the right of succession to the *maths* and the property annexed to them. That controversy was settled by an arrangement embodied for the present purpose in an *ekrarnama* dated the 3rd November 1874, executed by Sriram Das, senior *chela*, in favour of the junior *chela*, described as *adhikari* Lakhan Das, by which the *math* at Bhadrak was allotted in perpetuity to the elder *chela* and his successors, while the *math* at Bibisarai, and the properties annexed to it, were allotted to the younger *chela* and his successors, for the purposes connected with his *math*, subject to an annual payment of Rs. 15 towards the expenses

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of the Bhadrak *math*. The parties to the present suit stand in the place of the elder and younger *chelas* respectively.

The learned Judges of the High Court have rightly held that in point of law the property dealt with by the *ekrarnama* was prior to its date to be regarded as vested not in the Mohant, but in the legal entity, the idol, the Mohant being only his representative and manager. And it follows from this that the learned Judges were further right in holding that from the date of the *ekrarnama* the possession of the junior *chela*, by virtue of the terms of that *ekrarnama*, was adverse to the right of the idol and of the senior *chela*, as representing that idol, and that, therefore, the present suit was barred by limitation.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the respondent has not appeared upon the hearing of the appeal, there will be no order as to costs.

J. V. W.

Appeal dismissed.

Solicitors for the Appellant : T. L. Wilson & Co.

CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Teunon.

BHAIRAB CHANDRA KOLAY

v.

CORPORATION OF CALCUTTA.*

1910

June 9.

Joint Penalty—Joint Conviction, legality of—Calcutta Municipal Act (Beng. III of 1899), ss. 444 and 574—Disobedience of order under s. 444 (2) by two persons.

The owner and an occupier of a house in Calcutta were jointly convicted of disobedience of an order under section 444 of the Calcutta Municipal Act, and a joint penalty of fine was imposed upon them :—

Held, that the joint conviction and the joint penalty were illegal, each of the accused being guilty of a separate offence.

THE petitioners, one of whom was the owner and the other an occupier of the premises 26-1 and 26-2, Sett Bagan Lane in the town of Calcutta, and who both resided therein, were jointly tried by the Municipal Magistrate, convicted, and jointly sentenced to a fine of Rs. 50 under sections 444 (2) and 574 of the Calcutta Municipal Act (Beng. Act III of 1899), on the 8th March 1910.

A notice under section 444 (1) of the Act was served on them, on the 22nd October 1908, to show cause why they should not be prohibited from using the said premises as being unfit for human habitation. On the 1st December 1908, the Magistrate passed an order under section 444 of the Act, prohibiting the further use of the premises for habitation and allowing three months' time either to vacate or to improve the buildings, and to obtain the required certificate from the Chairman. The petitioners were prosecuted for disobedience of such order and convicted and sentenced as above.

Babu Jnanendra Nath Sarkar, for the petitioner.

Babu Debendra Chandra Mallick, for the Corporation.

* Criminal Revision No. 593 of 1910 against the order of Amritalal Mookerjee, Municipal Magistrate of Calcutta, dated March 8, 1910.

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HARINGTON AND TEUNON JJ. This is a Rule calling upon the Municipal Magistrate and on the Chairman of the Corporation to show cause why the conviction and sentences passed on the accused should not be set aside on the ground that the joint penalty passed on the two accused on the 8th March last is illegal, and on certain other grounds which it is unnecessary for us now to deal with.

What happened is this. There was a house which, under section 444 of the Calcutta Municipal Act, had been found to be unfit for human habitation. An order was issued prohibiting persons from using the same, or suffering it to be used for the purpose of human habitation. Of the two accused, one is the owner and the other was apparently occupying the building with him. These two persons have been convicted under section 444, clause (2) read with section 574 for disobedience of the order of the Magistrate made under section 444, clause (2).

In each of these two persons the act of disobedience was a separate offence. In our view the passing of the joint conviction and joint penalty on the two persons, each of whom committed an offence, is not warranted by any provisions of law.

We have perused the explanation of the Magistrate, and we have heard the learned vakil who shows cause against the rule. Neither the learned vakil nor the Magistrate are able to support the sentence under any provision of the law.

The result is, we must make the rule absolute on the ground that the passing of the joint penalty on the accused who are guilty of separate offences is illegal. We, therefore, set aside the conviction and sentence passed on the accused, and direct that the case be re-tried. The fine, if paid, must be refunded.

Rule absolute.

E. H. M.

APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Doss.

BIPIN BEHARI MITRA

v.

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June 10

Mortgage—Execution—Stay of sale in execution of mortgage-decree—Jurisdiction of Court to stay sale—Waiver on behalf of minor of fresh sale-proclamation—Guardian-ad-litem, right of—Benefit to minors—Minors, if entitled to impugn sale afterwards for want of fresh proclamation—Transfer of Property Act (IV of 1882) s. 89—Civil Procedure Code (XIV of 1882) s. 291.

The Court has jurisdiction to order stay of a sale in execution of a mortgage-decree under s. 291 of the Civil Procedure Code, 1882.

Shyamkishan v. Sundar Koer (1) explained. *Bibijan Bibi v. Sachi Bewah* (2) referred to.

There is no conflict between s. 89 of the Transfer of Property Act and s. 291 of the Code of Civil Procedure, 1882. The former section is concerned with the Court's order-absolute for sale, the latter with the adjournment of the sale. The two sections relate to different matters.

Even if an order of the Court is erroneous, it is *ordinarily* not open to a party, who has obtained and enjoyed the benefit of an erroneous order, to turn round afterwards and ask that the order should be treated as a nullity and disregarded.

The guardian *ad litem* appointed by the Court and acting in good faith is entitled to make applications on behalf of the minors, and has the power to waive the right of the minors to a fresh sale-proclamation after postponement of the sale, if the postponement enured to the benefit of the minors.

The minors are not entitled in such a case to impugn the sale on the ground that a fresh sale-proclamation was not made.

APPEAL [No. 313] by Bipin Behari Mitra and others, the auction-purchasers; and Appeal [No. 449] by Khoka Lal Mittra, minor, by his certificated guardian and mother, Parulsundari Dasi, the decree-holder.

On the 20th July 1896, Surendranath Ghose and Manindranath Ghose executed a mortgage bond in favour of Lal Behari

*Appeals from orders, Nos. 313 and 449 of 1908, against the orders of Raj Krishna Banerjee, Subordinate Judge of 24-Parganas, dated June 30, 1908

(1) (1904) L. L. R. 31 Calc. 373. (2) (1904) L. L. R. 31 Calc. 863.

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Mitra. On a suit based on the said bond, a mortgage-decree was passed on the 9th December 1899. In this decree all the previous and subsequent mortgagees were parties besides the mortgagors. The decree was executed on the 27th November 1900. While the execution case was pending, Surendranath preferred an appeal against the decree and got an order from the High Court for stay of the execution case, upon depositing Rs. 2,000 and furnishing security to the satisfaction of the lower Court. The sum of Rs. 2,000 was deposited, but upon failure to furnish security, the mortgaged properties were sold free from all incumbrances and purchased by one Jogendra Chandra Ghose at Rs. 1,08,560. Subsequently, the said decree was set aside by the High Court, and a fresh decree was passed in lieu of the original decree. The sale was thereafter set aside. The fresh decree passed by the High Court was then executed, and in this execution case the minor sons of the deceased judgment-debtor were made parties, and their mother was nominated by the decree-holders as the guardian *ad litem* of the minors. She expressed her unwillingness to act as their guardian. Thereupon, the nazir was appointed the guardian *ad litem* by the Court. The 14th of July 1902 was at first fixed as the date of sale. On the 11th July all the judgment-debtors, major or minor, applied for 3 months' time to enable the Collector to make necessary inquiries for taking the properties under the Court of Wards and for paying off the debts due to the decree-holders. On that application two months' time was granted to the judgment-debtors for making the necessary inquiries, on condition, among others, that they would waive their right to a fresh sale-proclamation, and making other objections regarding the irregularity in publishing the sale-proclamation. The judgment-debtors complying with the conditions, by a written application, the sale was postponed till the 15th September 1902. On that date the decree-holder's uncle, Bipin Behari Mitra, who lives jointly with the decree-holder, and who was one of the prior mortgagees, purchased all the mortgaged properties in the district of Backerganj, and his friend, Bipin Behari Bhattacharji,

purchased the judgment-debtors' house. This was the sale which was sought to be set aside in the case now on appeal. One of the grounds was that no waiver could be made on behalf of the minor judgment-debtors.

The Subordinate Judge held that the Court had no power to adjourn the sale of the mortgaged properties with a view to give time to the mortgagor to raise money to pay off the decree, and that the nazir, who had been appointed guardian *ad litem* of the minors, did not act properly, or for the benefit of the minors, in filing the petition of postponement of the sale and waiving a fresh sale-proclamation. He, therefore, held that the minors were not bound by the act of the nazir and set aside the sale.

Dr. Rashbehary Ghosh (with him *Babu Tarakishore Chaudhuri*, *Babu Prabhask Chandra Mitra*, *Babu Jadunath Kanjilal* and *Babu Hari Charan Ganguli*), for the appellants in Appeal No. 313. The mother is not competent to supersede the nazir as guardian: *Jwala Dei v. Pirbhu* (1), *Venkata Chandrasekhara Raz v. Alakaraajamba Maharani* (2) and *Krishna Pershad Singh v. Gosta Behari Kundu* (3). There is no finding of fraud. Sale has been set aside on the ground that the Court had no jurisdiction to allow postponement. There is no authority for holding so. *Shyamkishan v. Sundar Koer* (4), relied on by the learned Subordinate Judge, does not hold that the Court has no jurisdiction. There is no conflict between section 89 of the Transfer of Property Act and section 291 of the Civil Procedure Code: *Bibijan Bibi v. Sachi Bewah* (5).

On the question of the guardian's right to a waiver, the case of *Luchmeswar Singh v. Chairman of the Darbhanga Municipality* (6), relied on by the Subordinate Judge, has no bearing. *Mussamat Bibee Efatoonnissa v. Khondkar Khoda Newaz* (7) is inapplicable. The minors have enjoyed the benefit of the postponement. They are now estopped from questioning it.

(1) (1891) I. L. R. 14 All. 35.

(4) (1904) I. L. R. 31 Calc. 373.

(2) (1898) I. L. R. 22 Mad. 187.

(5) (1904) I. L. R. 31 Calc. 863.

(3) (1907) 5 C. L. J. 434.

(6) (1890) I. L. R. 18 Calc. 99.

(7) (1874) 21 W. R. 374.

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As regards the plea of irregularity, it must be established that inadequacy of price at the sale was the result of the irregularity : *Mahabir Pershad Singh v. Dhanukdhari Singh* (1), *Ismail Khan v. Abdul Aziz Khan* (2), *Roy Gowree Nath Sahoy v. Shah Fukeer Chand* (3), *Bajinath Goenka v. Maharaja Sir Ravanaeswar Prasad Singh* (4) and *Gajrajmati Teorain v. Akbar Husain* (5). The minor is bound by the consent of the guardian. The principle of the case of *Sheo Nath Saran v. Sukh Lal Singh* (6) is applicable.

Mr. B. Chakravarti (with him *Babu Surendranath Sen* and *Babu Bimal Chandra Sen Gupta*), for the appellant in Appeal No. 449.

Mr. A. Chaudhuri (with him *Babu Jogesh Chandra Roy*, *Babu Manmathanath Mukherji*, *Babu Amarendranath Bose* and *Babu Hiralal Chakrabarti*), for the respondents. Guardian's consent to certain matters of procedure may be binding, but not in matters involving such important issues. In such cases absence of bidders may be presumed : *Goopee Nath Dobey v. Roy Luchmeeput Singh Bahadur* (7). *Shyamkishan v. Sundar Koer* (8) is in my favour. See also *Bibijan Bibi v. Sachi Bewah* (9). If the order was not without jurisdiction, it was at least irregular, and then I have only to show that I have suffered loss.

As regards the waiver, it was not good without the sanction of the Court. A fresh proclamation must be made under the Code. The right to a fresh proclamation is not a right inherent in a person. On the question of waiver, see *Dhanukdhari Singh v. Nathima Sahu* (10). It is a question of fact, and we have to see whether there was actually a waiver. Did the guardian understand what he was doing ?

Mr. B. Chakravarti, in reply.

Cur. adv. vult.

(1) (1904) I. L. R. 31 Calc. 815.

(2) (1905) I. L. R. 32 Calc. 502.

(3) (1872) 18 W. R. 347.

(4) (1907) 6 C. L. J. 163.

(5) (1906) I. L. R. 29 All. 196 ;

L. R. 34 I. A. 37.

(6) (1899) I. L. R. 27 Calc. 229.

(7) (1877) I. L. R. 3 Calc. 542.

(8) (1904) I. L. R. 31 Calc. 373.

(9) (1904) I. L. R. 31 Calc. 863

(10) (1907) 11 C. W. N. 848.

JENKINS C.J. This is an appeal [No. 313] from an order made by the Subordinate Judge of the 24-Parganas on the 30th of June 1908, setting aside a sale in execution held as far back as September 1902.

The mortgage, on which the suit and the execution proceedings were founded, bears date the 9th of December 1899, and thereby Surendra Nath Ghose and Manindra Nath Ghose mortgaged the property in dispute to Lalbehari Mittra to secure Rs. 25,000.

On the 25th of September 1899, the mortgagee instituted a suit against the mortgagors and certain prior and puisne mortgagees for the realisation of his mortgage, and on the 1st of August 1901 a decree was passed on appeal by the High Court directing, in the events that have happened, a sale of the properties subject to all prior incumbrances, unless the incumbrancers consented to the sale. On the 18th of January 1902 an order absolute for sale was made.

On the 2nd February 1902, Manindra Nath Ghose died and was succeeded by his minor sons and heirs, on whose application the order now under appeal was made.

Their mother having expressed her unwillingness to be so appointed, the nazir of the Court was, on the 26th of April 1902, in accordance with the usual practice, appointed to be guardian for the suit for the minors.

The day fixed for the sale of the property was the 14th of July, but on the 10th of July the judgment-debtors, the minors, being represented by their guardian, applied at the Collector's suggestion for a postponement of the sale for three months, with a view to enquiries being made whether the properties should be taken under the charge of the Court of Wards. Notwithstanding the decree-holder's objection, two months' time was granted, but it was made a condition of this concession that the judgment-debtors should pay Rs. 200 as damages to the decree-holder and "waive their right to a fresh sale-proclamation and to making other objections regarding the irregularity in publishing the sale-proclamation."

On the 14th July 1902 a petition was presented by Surendra Nath Ghose and the nazir on behalf of the minors, stating that

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they had brought the Rs. 200 into Court, and waived all right to the issue of a fresh sale proclamation and all objections on the ground of irregularities in connection with the execution of the decree, and they prayed that the decree-holder might be directed to receive the Rs. 200 and that the sale might be postponed, and Monday the 15th of September fixed for the sale.

On the same day the Court made an order as prayed, and postponed the sale till 1 P.M. of the 15th September 1902 without any fresh sale-proclamation. The Court of Wards did not take the property under its charge, and in the end the sale was held on the 15th of September 1902 as directed, without any fresh sale-proclamation. At the sale, the present appellant purchased the property for Rs. 39,878 subject to prior incumbrances, which are estimated at over Rs. 85,000. On the 13th November 1902 the sale was confirmed and possession was delivered on the 19th of December 1902.

On the 29th of August 1903 the minors' mother applied, under the Guardian and Wards Act, to be appointed their guardian, and on the following 8th of December a certificate was granted to her. On the 12th of June 1907 she made the present application to set aside the sale, and this she did, though the nazir had not been removed. The petition embodying the application charges fraud, illegality and irregularity on the part of the decree-holder, and neglect of duty on the part of the nazir; but the Subordinate Judge has not upheld these charges, nor have they been advanced before us. The learned Judge, however, held that the nazir "did not act properly and for the benefit of the minors in filing the petition on the 14th July making the waiver under consideration and.....that they are not bound thereby." In coming to this conclusion, he was influenced by his view that "the postponement of the sale from the 14th July to the 15th September, and no proclamation having been made that the sale would take place on the latter date, caused substantial loss to the judgment-debtors."

He accordingly set aside the sale absolutely and unconditionally, regardless of the fact that Surendra Nath Ghose was

not a party, and without any direction as to the purchase-money paid by the purchaser, or the amount expended by him in the discharge of prior incumbrances and for other matters. By the rules of this Court, section 291 of the Code of Civil Procedure, 1882, applied to this sale, and that section empowered the Court in its discretion to adjourn any sale to a specified day and hour; but it was prescribed that whenever a sale was adjourned under the section for a longer period than 7 days a fresh proclamation should be made, unless the judgment-debtor consented to waive it. Now, on the facts I have narrated, there can be no question that Surendra Nath Ghose gave such consent, and that the nazir, as the guardian for the suit for the minors, purported to give his consent. The only question is whether, in so doing, the nazir acted beyond his powers. That he acted in good faith is beyond dispute. The minors' own mother on the 22nd April 1902 presented a petition to the Court whereby she prayed that a proper order might be passed for staying the execution proceedings till the final disposal of the application made on behalf of the minors to the Board of Revenue. Surendra Nath, the minors' adult uncle, joined with the nazir in making the application for postponement, and submitted to the condition imposed by the Court: the petition itself shows that the application was made at the Collector's suggestion: and the condition was imposed by the Court before whom all the material facts were placed. But, then, it is urged on behalf of the minors that even though the nazir acted in good faith, he had not the power to waive a fresh proclamation: *first*, because the whole order was beyond the Court's jurisdiction; and, *secondly*, because the nazir, as guardian, had not the power to give up a right vested in the minors.

The argument that the order was without jurisdiction rests on certain remarks contained in the judgment of the Court in *Shyamkishan v. Sundar Koer* (1) which, it is contended, show that in the circumstances it was not competent to the Court to adjourn the sale, inasmuch as it was in execution of a mortgage-decree. The contention rests on a supposed conflict between

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section 89 of the Transfer of Property Act and section 291 of the Code of Civil Procedure, 1882. But I fail to see the conflict: the one section is concerned with the Court's order absolute for sale, the other with the adjournment of the sale directed, and so they relate to different matters. Reading the judgment in *Shyamkishan's case* (1) as a whole, I do not think it was intended to lay down that the order for adjournment was without jurisdiction, but only that it was erroneous [cf. *Bibijan Bibi v. Sachi Bewah* (2)]. But even assuming, for the sake of argument, that the order with which we are concerned was erroneous, it obviously is not ordinarily open to a party, who has obtained and enjoyed the benefit of an erroneous order, afterwards to turn round and ask that the order should be treated as a nullity and disregarded. But does it make any difference that minors were concerned? The guardian was clearly entitled to make the application on behalf of the minors (section 441 of the Civil Procedure Code, 1882), and in my opinion he could consent to waive, as he did, the fresh proclamation, that being a condition on which the Court insisted as a term of making the concession sought. It is argued that in so doing he gave up a right belonging to the minors, and that this he could not do. But the right was one created by section 291 of the Civil Procedure Code, and was a mere matter of procedure in execution prescribed by that section. I therefore fail to see what there was to prevent the guardian, acting as he did in good faith, from giving the consent contemplated by the section so as to bind the minors thereby. Therefore, I hold that the minors cannot now impugn the sale on the ground that a fresh proclamation was not made.

In this view of the case, it is not strictly necessary to consider how far the Subordinate Judge's conclusion as to the loss occasioned to the judgment-debtors by the waiver of the fresh proclamation can be sustained; but as the matter has been discussed before us, and the evidence has been brought to our notice, I think it right to say that I am unable to agree with the Subordinate Judge. In effect, he bases his conclusion on the

(1) (1904) I. L. R. 31 Cal. 373.

(2) (1904) I. L. R. 31 Cal. 863.

supposition that the net income of the property was not less than Rs. 12,000, and that 17½ years' purchase was a fair estimate of its capital value.

In taking Rs. 12,000 as the net income, the learned Judge was influenced by the judgment-debtor's treaty with the appellant for a *putni* at that rate; but nothing came of it. Mr. Chaudhuri has further attempted to support this figure by a statement in Romesh Chandra Chakravarti's affidavit filed on the 11th July 1902, in which he says: "I made an enquiry in the locality, and at the cutchery of the judgment-debtors, and came to know and believe that the annual net income thereof would be Rs. 12,000 (twelve thousand), and that the value thereof in an unencumbered estate would by no means be more than Rs. 1,10,000."

This, it is said, shows that the Judge was justified in taking the net profits as Rs. 12,000; but the affidavit itself indicates the information on which this estimate was based, and in this oral evidence before the Subordinate Judge, Romesh Chandra Chakravarti explains the statement in his affidavit in a manner which deprives it of the force that the respondents would ascribe to it.

After careful consideration of the oral evidence, and of the tables of figures that have been placed before the Court, I am not convinced that the net income of the property was at the time of the sale Rs. 12,000. Mr. Chaudhuri endeavoured to support the view that the income of the properties could not be less than this sum by a reference to certain settlement papers. No reliance, however, was placed on these in the Court of first instance, and rightly so, for the inference sought to be drawn from them rests on the fallacy of identifying the annual value of a piece of land with the sum of the rents payable in respect of the several tenures and under-tenures relating to it. The acceptance of 17½ years' purchase as the proper multiplier, for the purpose, of arriving at the capital value of the land rests on the evidence of Raj Kumar Singha, a servant of Maharaj Kumar Kristo Das Laha, who speaks to a treaty for the purchase by his master of the property at 17½ years' purchase.

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But this treaty proved infructuous, and it would be a mistake to place too much reliance on it. It is true that some of the judgment-debtors' witnesses, speaking generally, would put the multiplier at 12, 15, 16, 20, or 25 years' purchase. But as against this there is distinct evidence on the appellant's side of two specific sales, in one of which the property was sold at 6, and in the other at 9 years' purchase, and it is contended on behalf of the appellants that this represents fair value.

The figure may appear small, but regard must be paid to all the circumstances. First, it must be borne in mind that this was a forced sale, and the difficulties that attended an auction-purchaser have become proverbial.

This case has proved no exception, for there is evidence that this litigation is financed by the tenants; whether this is purely for altruistic motives may perhaps be doubted. Then the character borne by the district in which this property lies does not encourage high prices; it is subject to inroads of the sea, and it was treated as matter of common notoriety before us by counsel on both sides that the tenants of Backerganj have not the reputation of being the most tractable. Nor can I disregard the fact that though more than a year elapsed between the decree and the sale, no one could in the interval be discovered to save the judgment-debtors' position by finding the required money either as purchaser or mortgagee, and yet there is reason to suppose that efforts were made in this direction on behalf of the mortgagors.

I am, in these circumstances, unable to adopt the Subordinate Judge's view that the absence of fresh proclamation occasioned a substantial loss to the judgment-debtors, for it is not shown that the Judge's estimate of the value of the property represents what it would be reasonable to expect as the result of a forced sale, nor has it been shown that the absence of the fresh proclamation in any way affected the sale, which, it is to be noted, was adjourned on the 14th of July to a specified day and hour. Several other points were urged on behalf of the appellants, but in the view I take, they need not be noticed, and though cross-objections were filed on behalf of the

judgment-debtors, their counsel, in the exercise of his discretion, stated that he could not properly urge before us anything beyond those topics with which I have dealt, and it is on these alone that he has relied.

The result is that the appeal must be allowed, the order of the Court below reversed, and the application to set aside the sale dismissed with costs throughout.

This judgment will govern the other appeal (No. 449), in which the application is accordingly dismissed with costs throughout.

Doss J. concurred.

S. M.

Appeals allowed.

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ORIGINAL CIVIL.

Before Mr. Justice Pugh.

SARAT CHANDRA ROY CHOWDHRY

v.

M. M. NAHAPIET.*

1910
June 20.

Mortgage—Practice—First mortgagee's suit for sale—Surplus of sale proceeds—Second mortgagee's claim for sale in first mortgagee's suit of other property on which he has a mortgage—Civil Procedure Code (Act V of 1908) order XXXIV—Costs.

B mortgaged property in Calcutta to *A* and afterwards mortgaged the same property and a further property in the mofussil to *C*. *A* brought an ordinary mortgage suit against *B* for sale, making *C* a party-defendant. *A* obtained a decree. *C* thereupon claimed to be entitled to a decree for sale of the property mortgaged to *A* including the mofussil property not included in *A*'s mortgage:—

Held, that in *A*'s suit *C* could only obtain the surplus of the sale proceeds of the property in that suit and could not get any relief against the other property in the mofussil.

Kissory Mohun Roy v. Kally Churn'Ghose (1), *Kissory Mohun Roy v. Kali Churn Ghose* (2), *In re Kissory Mohan Roy v. Kali Charan Ghose* (3), and *Platt v. Mendel* (4) distinguished.

* Original Civil Suit No. 1151 of 1909.

(1) (1894) I. L. R. 22 Calc. 100.

(3) (1896) 1 C. W. N. 106.

(2) (1897) I. L. R. 24 Calc. 190.

(4) (1884) 27 Ch. D. 246.

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Mackintosh v. Watkins (1) followed.

The effect of the incorporation of the sections in the Transfer of Property Act into order XXXIV of the new Code of Civil Procedure is to put an end to any independent practice on the Original Side of the High Court based on the old procedure, and the Original Side should now follow the provisions of order XXXIV of the Code.

Costs will be on Scale No. 2, not Scale No. 1, against the mortgagor who does not appear.

THIS was a mortgage suit brought by the plaintiffs, Sarat Chunder Roy Chowdhry and others, as first mortgagees, against the mortgagor, M. M. Nahapiet; and one J. C. Galstaun, a second mortgagee, was made a party defendant.

The mortgage to the plaintiffs was dated the 30th September 1908, and the security for the principal sum of Rs. 67,000 was the property situate at No. 8-1, Loudon Street in the town of Calcutta. The mortgage to J. C. Galstaun was dated the 26th April 1909, the property mortgaged being No. 8-1, Loudon Street in the town of Calcutta, and also a piece of leasehold land situate in Baikanthanathpur in zilla Darjeeling. The defendant, M. M. Nahapiet, did not defend the suit, but the 2nd defendant, J. C. Galstaun, entered appearance and filed a written statement praying for a decree for sale on his mortgage as well as the leasehold property not included in the mortgage to the plaintiffs.

Mr. C. Bagram, for the 2nd defendant, J. C. Galstaun, submitted that he was entitled to a decree for sale on his mortgage, including the leasehold property not included in the mortgage to the plaintiffs, and in support of his argument cited the following cases: *Auhindro Bhoosun Chatterjee v. Chunnoololl Johurry* (2), *Kissory Mohan Roy v. Kali Churn Ghose* (3), *In re Kissory Mohun Roy v. Kally Charan Ghose* (4) and *Platt v. Mendel* (5). The form of the decree set out in Schedule I, Appendix D, Form No. 7 of the Code shows that such relief to the second mortgagee is contemplated.

Mr. D. N. Bose, appeared for the plaintiffs.

(1) (1904) 1 C. L. J. 31.

(2) (1879) I. L. R. 5 Calc. 101.

(3) (1897) I. L. R. 24 Calc. 190.

(4) (1896) 1 C. W. N. 106.

(5) (1884) 27 Ch. D. 246.

PUGH J. This is a suit filed by a first mortgagee against his mortgagor and also against the second mortgagee. The second mortgagee's security consists of a second mortgage on the Calcutta property subject to the plaintiffs' first mortgage, and also what is said to be a first mortgage on certain property in the mofussil, and he asks for a decree in his favour for the amount of his claim and for a direction that, in the event of the Calcutta property proving insufficient to pay the first mortgage and also his own, the mofussil property may be sold by this Court. It has become necessary to consider this position because of the Civil Procedure Code of 1908. There was a recognised practice on the Original Side of this Court which, as stated by Mr. Justice Sale in *Kissory Mohun Roy v. Kally Churn Ghose* (1), was to treat the preliminary decree as being in favour not only of the first mortgagee, but also in favour of the second mortgagee, one of the defendants. A further extension of this principle appears in the report of an application in the same suit (2) also under the name of *In the matter of Kissory Mohan Roy v. Kali Charan Ghose* (3), where Mr. Justice Sale allowed a second mortgagee, who was a defendant, under the liberty retained to him by the preliminary decree, to come in and obtain an order for sale of the property outside Calcutta, which was subject only to the second mortgage, not to the first. This practice of treating the suit as one for the benefit of the second mortgagee is based on, or at any rate is in accordance with, the English practice as it appears from the case of *Platt v. Mendel* (4). It will be observed that this procedure being based upon the old practice of the Original Side, does not profess to be in agreement with the terms of the Transfer of Property Act. In *Mackintosh v. Watkins* (5), Brett and Mookerjee JJ., sitting on the Appellate Side and dealing with a mortgage of Darjeeling property, held, that under the Transfer of Property Act, the proper procedure was different, and they held in effect that the second mortgagee was merely made a

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(1) (1894) I. L. R. 22 Cal. 100.

(3) (1896) 1 C. W. N. 106.

(2) (1897) I. L. R. 24 Cal. 190.

(4) (1884) 27 Ch. D. 246.

(5) (1904) 1 C. L. J. 31.

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party to the suit in order that he might have an opportunity of redeeming if he wished, and in order that he might receive his mortgage money, or part of it, out of the surplus sale-proceeds after satisfaction of the first mortgage, but that the decree was not really a decree in his favour, and that he could not insist upon a sale nor get a personal decree in his favour if the first mortgagee was satisfied by the mortgagor before or by means of the sale.

This deals only with the simple case of a first and second mortgagee: the matter here is complicated by the fact that part of the security of the second mortgagee and that which he wishes to have sold is outside the jurisdiction. In my view, the effect of the incorporation of these sections of the Transfer of Property Act as order XXXIV of the Civil Procedure Code is to put an end to any independent practice on this side of the Court based on the old procedure, and that the Original Side of the Court should now follow the provisions of the Transfer of Property Act which have been imported into the Civil Procedure Code as order XXXIV, and with them are imported the Forms 4 to 11 of Appendix D in the first Schedule which are part of the Act. Referring to Form No. 7, it will be observed that it provides for an account to be taken of what is due to the plaintiff and describes that amount as Rs. X. It then provides for an account of what is due to the first defendant and describes that sum as Rs. Y, and it then provides what is to happen on payment or non-payment of Rs. X, and it provides that if there is a surplus on sale, that is to go in discharge of the sum referred to as Rs. Y. There is no trace of any provision to enable the first defendant, the second mortgagee, that is the person entitled to Rs. Y, to proceed by way of sale or to get any relief at all if the other defendant, i.e., the mortgagor, satisfies the first mortgagee's claim referred to as Rs. X.

In my view, therefore, under the Code, the second mortgagee is there simply for the purpose as indicated by Brett and Mukerjee JJ. of receiving any surplus sale-proceeds or of redeeming, and that he cannot take any independent action and treat the decree as in other respects in his favour. It

follows, therefore, that if he has, as he has here, a claim to other property as well, that matter can only be dealt with by a separate suit, and of course he will be able to bring that suit notwithstanding he is a party to this one. There is one matter that I might mention in favour of this view, and that is that there might very well be a prior or a subsequent mortgagee or an assignee of that other property which is also included in the second mortgagee's security. Such persons would not be proper parties in a suit by the first mortgagee. In fact, if the first mortgagee made them parties, I take it they would be entitled to be dismissed from the suit, and on the other hand it is clear that the property, the subject of the second mortgage, could not be sold except in their presence, and after decree had been made with respect to their interests. There is no doubt the decision of Mr. Justice Sale, to which I have referred, which says that such a sale can take place under a decree of the Original Side of this Court, but the *ratio decidendi* there was that the old practice and not the Transfer of Property Act was to be followed.

There have been such orders made, and it is not necessary for me to express any opinion as to whether they were properly made or not, because in my view the matter has now to be dealt with on a different basis. But I only add, with regard to that decision, that I have some doubt as to the foundation for it under the Charter of this Court. The Charter gives leave to a plaintiff to proceed against immoveable property partly within and partly without the jurisdiction of this Court, provided he gets leave of Court, otherwise he can only proceed against the property within the jurisdiction. Mr. Justice Sale treats that as a restriction which does not apply to the case of a defendant, and he concludes that that being so, a defendant is not under such a restriction and can bring to sale property outside the jurisdiction.

To me the provision seems one of extension and not of restriction, and as it does not apply to the defendant, it seems to me that a defendant could not have those extended privileges which are given only to a plaintiff who gets the leave of the

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Court. It is not necessary for me to decide that point, because I have come to the conclusion that we have to follow the Civil Procedure Code, and that under the terms of that Code, once the first mortgagee has either got his money or sold the property, the subject of his security, his suit is finished, and the second mortgagee defendant cannot treat that suit as a suit of his own for the purpose of actively enforcing his second mortgage, whether the property, the subject of it, be within or outside the jurisdiction. It was stated by Mr. Mitter at the Bar that in some cases he had been called upon to argue in favour of the proposition that this Court can sell property outside Calcutta, and that it had been decided that the Court could sell property outside the jurisdiction, provided some part of the property was within the jurisdiction and leave had been obtained. I certainly have always been under the impression that there was no doubt whatever as to that. It seems to me obvious on the Letters Patent and too clear to require either argument or decision. It would be most unfortunate if any doubt was thrown on the correctness of the practice of selling properties in that way. For many years, ever since the Charter, persons who have lent money on mofussil property have frequently declined to do so unless and until a certain portion of Calcutta property was included in the mortgage, so as to give the Original Side jurisdiction over the mofussil property, and no doubt at the present time there are enormous sums in the aggregate lent out on the faith of what is considered settled law.

There will be a decree in this case in Form No. 7 in the Appendix. The only matter in regard to that Form is that it seems rather waste of time and expense to take an account of what is due on the second mortgage, unless there be a surplus from the sale-proceeds of the property.

It might be considered, with regard to this Form, whether it would not be better that the direction should be to take the account of the second mortgage in the event of there being any surplus, but in the meantime, till there is some alteration in the Form by a rule of the Court or otherwise, the Form in the Code had better be followed.

The question of the scale of costs to be allowed in this case has also been discussed. The first mortgagee is compelled by law to make the second mortgagee a party. He, therefore, has no option but to bring him in as a defendant and to incur expense as on the basis of scale No. 2. The second mortgagee is also brought here. He has to incur expense on the basis of scale No. 2. He is entitled to add such costs to his claim. The first mortgagee is entitled to costs on scale No. 2 as against the mortgagor who does not appear, although a decree is as a rule on scale No. 1 as against a defendant who does not appear, for three reasons : *first*, that they are part of the necessary expenses of enforcing his mortgage, he cannot avoid incurring them ; *secondly*, in this country the common form of Calcutta mortgage used in this case contains a covenant by which the mortgagor expressly covenants to pay the costs of and incidental to realizing the security, and he therefore is liable to pay the costs on scale No. 2 under his covenant irrespective of what the ordinary practice of this Court is as regards scale No. 1 ; *thirdly*, he is responsible for executing a second mortgage and rendering it necessary to bring in another defendant. The plaintiff is entitled to his costs on scale No. 2, and can add them to his claim or his personal decree for the balance against the mortgagor. The second mortgagee is entitled to have his costs taxed on scale No. 2 and he can add them to his claim.

Attorneys for the plaintiff : *B. N. Bose & Co.*

Attorneys for the defendant : *Gregory & Jones.*

R. G. M.

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APPELLATE CIVIL.

Before Mr. Justice Chatterjee and Mr. Justice Richardson.

1910
July 12.

JUGAL PERSHAD SINGH

v.

PARBHU NARAIN JHA.*

Appeal, valuation of—Court-fees Act (VII of 1870) s. 5, Sch. I, Art. 1, and Sch. II, Art. 17, cl. (6)—Valuation of appeal when no amount claimed, but liability of certain properties disputed—Memorandum of appeal—Taxing Officer—Acceptance of court-fee by Deputy Registrar, finality of.

Where the appellant in an appeal against a mortgage decree does not dispute the amount decreed, but raises the question of the liability of certain properties, the value of the appeal for the purpose of the court-fees is the value of such properties. Sch. II, Art. 17, cl. (6) of the Court-fees Act (VII of 1870) has no application to such a case.

Kesavarapu Ramakrishna Reddi v. Kotta Kotu Reddi (1), *Bunwari Lal v. Daya Sunker Misser* (2) referred to.

A memorandum of appeal was admitted by the Deputy Registrar of the High Court, and no question was raised as to the sufficiency of the court-fees. At the hearing of the appeal, it was objected on behalf of the respondents that the court-fee was insufficient :—

Held, that there having been no decision under section 5 of the Act by the Taxing Officer, who was the Registrar of the High Court, it was open to the respondents to raise the objection at the hearing of the appeal.

Kasturi Chetti v. Deputy Collector, Bellary, (3) referred to.

APPEAL by the defendants, Jugal Pershad Singh and others.

This appeal arose out of a suit to enforce a mortgage bond. The bond was executed by one Janki Pershad Singh in favour of the plaintiffs in his own name and in the name of his son, defendant No. 1, who was at the time a minor. After the execution of the bond, two other sons were born to Janki Pershad. The plaintiffs brought this suit, on the death of Janki Pershad, against the three sons. The defendants Nos. 2

*Appeal from Original Decree, No. 526 of 1908, against the decree of Rajendra Nath Dutt, Subordinate Judge of Bhagulpur, dated June 30, 1908.

(1) (1906) I. L. R. 30 Mad. 96.

(2) (1909) 13 C. W. N. 815.

(3) (1898) I. L. R. 21 Mad. 269.

and 3, who were minors, were represented by their mother as guardian *ad litem*. The family was governed by the Mithila law.

Defendants pleaded, *inter alia*, that Janki Pershad, their father, was a man addicted to drinking, and that the debts incurred by their father was tainted with immorality, and that neither the defendants nor their ancestral property was liable for such debts.

The Court below held that the major portion (Rs. 12,155) of the money was borrowed by Janki Pershad for the payment of antecedent debts, and the remainder (Rs. 844 and odd) for his current expenses, and passed a mortgage-decree in favor of the plaintiffs in respect of the sum of Rs. 12,155, making the entire mortgaged properties liable. As regards the remainder, the decree provided that this sum with interest would be realised from all the ancestral properties in the hands of defendants Nos. 1 to 3.

Against this decision the defendants appealed to the High Court, and paid a court-fee of Rs. 10 only on the memorandum of appeal.

Babu Joy Gopal Ghose (with him *Babu Kshetra Mohan Sen* and *Babu Sailendra Nath Palit*), for the respondents, took a preliminary objection that the court-fees paid by the appellants were insufficient. The appellants should have paid *ad valorem* court-fees: see *Kesavarapu Ramakrishna Reddi v. Kotta Kota Reddi* (1).

Babu Provash Chandra Mitter, for the appellants. The case is governed by Schedule II, Article 17, clause (6) of the Court-fees Act. It is not possible in this case to estimate at a money-value the subject-matter of dispute. I do not dispute the amount claimed, but my objection is that the mortgaged properties are not liable for the debts. Moreover, the objection as to the court-fee could not be taken at the hearing of the appeal, inasmuch as it was admitted as sufficient by the Deputy Registrar: see *Ranga Pai v. Baba* (2).

Cur. adv. vult.

(1) (1906) I. L. R. 30 Mad. 96.

(2) (1897) I. L. R. 20 Mad. 398.

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CHATTERJEE AND RICHARDSON JJ. The plaintiffs in the suit sued the defendants upon a mortgage bond, dated the 15th March 1898, executed in favour of the plaintiff by Babu Janki Pershad Singh, deceased, in his own name and the name of his son, the defendant No. 1, who was at the time a minor. Afterwards two other sons were born to Janki Pershad, who are the minor defendants, Nos. 2 and 3, represented in this litigation by their mother as guardian *ad litem*. The family of the defendants is governed by the Mithila law, which, for the present purpose, is the same as the law of the Mitakshara.

The principal sum secured by the mortgage is Rs. 13,000, and in regard to the circumstances in which the bond was executed, there is now no controversy, the parties having accepted the findings of the learned Subordinate Judge. The major portion of the money (Rs. 12,155-3-6) was borrowed by Janki Pershad for the payment of antecedent debts, and the remainder (Rs. 844-12-6) for his current expenses. The debts paid off and the fresh debt incurred are not justified by legal necessity, but at the same time they are not tainted by immorality or illegality, and the old debts carried a higher rate of interest than that payable under the mortgage.

The Subordinate Judge has given the plaintiffs in respect of the sum of Rs. 12,155-3-6 a mortgage-decree in the usual form, making the security enforceable for that amount with interest against the entire mortgaged properties. The decree further entitles the plaintiffs to recover the sum of Rs. 844-12-6 with interest from all the ancestral properties in the hands of the defendants Nos. 1 to 3. The distinction thus made between the two sums is founded upon a line of cases ending with *Kishun Pershad Chowdhry v. Tipan Pershad Singh* (1), and no question arises in regard to it.

The defendants Nos. 1 to 3 (there were other defendants in the suit) are the appellants before us, and the only grounds of appeal to which reference was made at the hearing are the following:—*Firstly*, that in respect of the sum of Rs. 844-12-6, the suit is barred by limitation; and, *secondly*, that in respect

of the sum of Rs. 12,155-3-6, the Subordinate Judge "should have held that the mortgage was not operative and binding against the appealing defendants so far as their shares in the mortgaged properties were concerned."

The plaintiffs, who are the respondents, took the preliminary objection that the court-fees paid by the appellants are insufficient. In respect of the second ground of appeal above stated, the appellants paid a fee of Rs. 10 under Schedule II to the Court-fees Act, 1870, Article 17, clause (6), stating that it was "not possible to estimate at a money value the subject-matter in dispute." The respondents controverted this proposition, and in support of their objection referred us to the case of *Kesavarapu Ramkrishna Reddi v. Kotta Kota Reddi* (1), decided by a Full Bench of the Madras High Court. The objection is clearly well-founded and it is unnecessary for us to say more, because the meaning of the clause of the Court-fees Act in question has recently been explained in the case of *Bunwari Lal v. Daya Sunker Misser* (2).

The appellants contended that such an objection could not be taken at the hearing, and cited the case of *Ranga Pai v. Baba* (3), but in the present case the effect of a decision by the taxing officer under section 5 of the Court-fees Act need not be considered, for the simple reason that there is no decision by that officer. The taxing officer is the Registrar on the Appellate side. The order for the registration of the appeal is signed by the Deputy Registrar and the matter never came before the Registrar at all: *Kasturi Chetti v. Deputy Collector, Bellary* (4).

The appellants, therefore, must pay an additional court-fee to make up the deficiency in the fee paid. If the requisite additional fee is not paid within fourteen days, the appeal will stand dismissed with costs.

S. C. G.

(1) (1906) I. L. R. 30 Mad. 96.
(2) (1909) 13 C. W. N. 815.

(3) (1897) I. L. R. 20 Mad. 398.
(4) (1898) I. L. R. 21 Mad. 269.

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P. C.*
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April 14;
July 15.

[On appeal from the High Court at Fort William in Bengal.]

Partition—Right to partition—Partition between owner of fractional share in zemindari interest, and mokararidars in joint possession—Interest not less permanent because the mokarari lease was liable, in certain events, to forfeiture.

The right of partition exists when two parties are in joint possession of land under permanent titles, although their titles may not be identical.

Hemadri Nath Khan v. Ramani Kanta Roy (1) cited with approval.

The appellants, plaintiffs in a suit for partition, were proprietors of a *mokarari* interest in the property partition of which was sought, and the respondents, defendants in the suit, were owners of a fractional share in the zemindari interest in the same property. The *mokarari* lease was, in certain contingencies, liable to forfeiture, and the High Court held that the appellants' tenure was on that account not sufficiently permanent to support their claim to partition, to which they would otherwise have been entitled:—

Held by the Judicial Committee (reversing that decision), that the distinction drawn by the High Court could not be supported. The appellants' title was a permanent one, though liable to forfeiture in events which had not occurred, and the rights incidental to that title must be those that attached to it as it existed, without reference to what might be lost in the future under changed circumstances.

APPEAL from a judgment and decree (5th May 1905) of the High Court at Calcutta, which reversed a judgment and decree (4th February 1904) of the Subordinate Judge of Gaya.

The plaintiffs were appellants to His Majesty in Council.

The question for determination in this appeal was as to the right of the appellants to a partition of certain villages called Kalapahar, Nimajodha and Muruli Khurd, the proprietary interest in which was vested to the extent of an 8 annas share in Rai Pasupati Nath Bose, respondent No. 4, whilst the remaining 8 annas share belonged to the appellants.

* *Present*: LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON, and MR. AMEER ALI.

(1) (1897) I. L. R. 24 Calc. 575.

On 16th September 1865, Rai Sham Lal Mitter and Rai Mohan Lal Mitter, the predecessors in title of Bepin Behari Mitter, Pramatha Nath Mitter and Chandra Nath Mitter, who were the only parties who opposed the partition, granted a *mokarari* lease of a 7 annas 6 pies share in the villages to Karori Lal, Lila Singh, Banwari Lal and Jagamohan Singh, the lease being described as "descendible to children in perpetuity, generation after generation, both in the male and female lines." The lease was made jointly to the four persons subject to a liability to pay a joint rent of Rs. 626 per annum ; but at the bottom of the deed the respective shares of the lessees were set out as being—Karori Lal 1 anna 8 pies, Lila Singh 1 anna 8 pies, Banwari Lal 1 anna 8 pies, and Jagamohan Singh 2 annas 6 pies.

On 21st January 1869, Banwari Lal sold his 1 anna 8 pies share in the lease to Lila Singh ; and on 10th March the lessees agreed amongst themselves that, instead of the above shares in the three villages, their interests should be as follows :—The four sons of Karori should have a 7 annas 6 pies share in Nima-jodha, Jagamohan Singh should have a 3 annas 9 pies share in Kalapahar, and Lila Singh should have a 3 annas 9 pies share in Kalapahar and a 7 annas 6 pies share in Muruli Khurd.

By two deeds of sale, dated 13th April 1891 and 12th September 1893, the appellants purchased from the sons of Karori Lal a 10 pies share in all the villages ; and on 27th May 1894 they purchased a 2 annas 6 pies share in all the villages from Jagamohan Singh. Thus they became entitled to a 3 annas 4 pies share in all the three villages ; or reckoning the shares with regard to the private partition of 10th March 1878, the purchase was of 3 annas 9 pies of Nimajodha, and the same share in Kalapahar.

The Mitter respondents thereupon instituted a suit (131 of 1895) for cancellation of the *mokarari* lease on account of breach of covenant ; the provision in the deed on which the claim was based being "in the event of our transferring the *mokarari* tenure, by *darmokarari* sale, conditional sale, gift, mortgage, or in any other way, or in the event of our allowing

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a single *bigha* or *biswa* of land included in the said mouzahs to go into the hands of other persons.....the zemindars and their heirs shall have power to take direct possession of the said mouzahs." The deed also stated that, "save and except receiving the rent mentioned in this *kabuliat*, the proprietors have, and shall have, no right to prefer any title, make any demand, or raise any dispute about the *mokarari* property." That suit was compromised, the purchasers paying a sum of money to the lessors to waive the forfeiture and to recognize the particular transfers objected to: and an agreement dated 6th April 1896 was drawn up between the parties by which, in consideration of the above payment, the following rights were conceded to the appellants, namely, the recording of their names as tenants in the zemindars' office register, that is, in the books of the Mitter respondents; and an apportionment of the rent in respect of the purchased shares, and the opening of a separate account. The apportioned rent was agreed upon as Rs. 278-3-6, to be paid as stated by instalments and at fixed dates.

On 13th August 1903, the appellants instituted the suit, out of which the present appeal arose, claiming partition of either a 3 annas 9 pies share in the two villages Nimajodha and Kalapahar, or a 3 annas 4 pies share in the three villages, that is, either on the basis of the agreement of 10th March 1878, or on the basis of the shares specified in the original lease. The defendants were Rai Pasupati Nath Bose, Bipin Behari Mitter, Pramatha Nath Mitter, and Chandra Nath Mitter, Lila Singh, and two persons, Mathura Pershad and Jagdam Sahai, purchasers from the sons of Karori Lal of a 3 annas 9 pies share in Nimajodha. Subsequently, all the vendors were also added as defendants, but they did not appear and enter a defence.

The co-sharers in the lease supported the claim for a partition, and it was not opposed by Rai Pasupati Nath Bose.

The Mitter defendants alone opposed the partition, pleading that only the plaintiffs Bhagwat Sahai and Beni Pershad (plaintiffs 1 and 3) had any right to sue; that they were not entitled to partition; and that they (the Mitter defendants)

refused to recognize the transfer made to Mathura Pershad and Jagdam Sahai.

The only issue material on this appeal was—"No. 5. Can the plaintiffs claim a partition in this suit as against defendants 2 to 4 (the Mitter defendants)?" and on this issue the Subordinate Judge said:—

"When the plaintiffs Nos. 1 and 3, Bhagwat Sahai and Beni Pershad, purchased share of *mokarari* interest of some of the original *mokararidars*, defendant Nos. 2 to 4 instituted a suit for cancellation of the *mokarari* lease on the ground of such purchase. In that case there was a compromise, and Beni Pershad and Bhagwat Sahai paid bonus and got their names registered in *serishta* of defendants Nos. 2 to 4 as owners of 3 annas and 4 pies share in the *mokarari* interest in the disputed and other *mouzahs* constituting the *mokarari* lease. This was stated in a registered *ekrarnama*, dated the 6th April 1896, produced by defendants Nos. 2 to 4 (Ex. A). For these reasons, these defendants, Nos. 2 to 4, who alone contest partition, are bound to recognise rights of at least plaintiffs Nos. 1 and 3 in the said share in the disputed *mouzahs*, and at least these plaintiffs can claim partition against defendants Nos. 2 to 4 as regards the said share in these properties in suit. I hold, however, that these defendants are not bound by any private partition between the original *mokararidars* or their heirs and assignees, as the lease was a joint lease. The defendants Nos. 2 to 4 have accepted rent from plaintiffs separately in respect of the said share. They have, therefore, admitted division of the tenancy or of the original *mokarari* lease: *Nubo Kishen Mookerjee v. Sreeram Roy* (1). For that reason also defendants Nos. 2 to 4 cannot object to partition of share of plaintiffs in the *mouzahs* sought to be partitioned. The original *mokarari* lessees had fixed shares in the *mouzahs* sought to be partitioned and in other *mouzahs* included in the lease, and that share has been stated in the original *mokarari kabuliyat* stated above. Consequently, there can be no objection on the part of defendants Nos. 2 to 4 for separate enjoyment of these *mouzahs* by the *mokararidars* in proportion to shares stated in the said document, though their liability to pay *mokarari* rent remains joint in regard to all *mouzahs* covered by the lease."

The Subordinate Judge accordingly made a decree allowing the partition.

From this decree an appeal by the Mitter defendants came before a Divisional Bench of the High Court (Rampini and Caspersz JJ.) who, holding that the interest of the plaintiffs in the *mokarari* lease was not of a nature to entitle them to claim a partition against the Mitter defendants, reversed the decree of the Subordinate Judge, and passed a decree dismissing the suit with costs.

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The judgment of the High Court appealed from was as follows :—

“ This is a suit for partition, but of a novel character. The plaintiffs are *mokararidars* of a 3 annas 4 pies share of mouzahs Kalapahar, Nimajodha and Muruli Khurd.

The *mokarari* was, however, granted by the ancestors of the defendants Nos. 2 to 4; it was renewed by these defendants in the names of the plaintiffs Nos. 1 and 3 only. The plaintiffs seek for partition of the lands of the *meahls*, claiming a 3 annas 4 pies share of them, as against the proprietors of the *mouzahs*. Defendant No. 1 is an 8 annas co-sharer: he has no objection to the partition. The defendants Nos. 2 to 4 are the proprietors of the remaining 8 annas proprietary interest. They are in direct possession of a 6 pies share of this interest. The other defendants, namely, defendants Nos. 5, 6, and 7, have a *mokarari* interest in the remaining $7\frac{1}{2}$ annas share. These last-mentioned defendants do not resist the plaintiffs' claim. It is the defendants Nos. 2 to 4 who alone do so.

“ The Subordinate Judge has allowed partition, and has passed a preliminary decree directing it to be carried out.

“ The defendants Nos. 2 to 4 now appeal. On their behalf it has been urged (i) that the suit is not maintainable, as tenure-holders cannot sue their landlords for partition; (ii) the plaintiffs as co-sharers only in the *mokarari* cannot sue for partition; (iii) that the defendants Nos. 2 to 4 do not recognise the plaintiffs Nos. 2, 4 and 5 and the defendants 6 and 7 as their tenants; (iv), that as there was a previous suit for partition, which was withdrawn without leave to bring a fresh suit, the present action is barred by the provisions of section 43 of the Code; and (v) that it has not been made out that any inconvenience will result from not partitioning the property, but rather the contrary.

“ The four last-mentioned pleas do not seem to us to have much force; but it is unnecessary for us to consider them, as, in our opinion, the first ground of appeal must prevail.

“ There are no precedents for such a suit as this. No case has been cited to us which is exactly in point. Our attention has been called to the cases of *Parbati Churn Deb v. Ainuddeen* (1); *Mukunda Lal Pal Chowdhry v. Lehuraux* (2), and the Full Bench case of *Hemadri Nath Khan v. Ramani Kanta Roy* (3). The first of these has no application. In the second, the principle that to entitle a person to partition, there must not only be joint possession, but the possession must be founded on the same title, was laid down. On this principle the plaintiffs have no right to partition. But the *ratio decidendi* of *Mukunda Lal Pal Chowdhry v. Lehuraux* (2) was disapproved of in the third case cited to us, *viz.*, the Full Bench Case of *Hemadri Nath Khan v. Ramani Kanta Roy* (3). This case was one brought by a zemindar, a 10 annas co-sharer, for partition against a putnidar of a 6 annas share. It was held that the plaintiff was entitled to partition in the circumstances of the case. But the learned Judges of the Full Bench laid down no general rule. On the contrary, Mr.

(1) (1881) L. L. R. 7 Cal. 577.

(2) (1892) L. L. R. 20 Cal. 579.

(3) (1897) L. L. R. 24 Cal. 575.

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Justice Banerji, who delivered the judgment of the Court, said :—‘ I think the Court must in each case determine whether, having regard to the nature of the interest owned by the parties and to all other circumstances necessary to be taken into consideration, the balance of convenience is in favour of allowing partition ; and if it determines that question in the affirmative, the mere fact of the parties owning interests which are not co-ordinate in degree, ought not to be a bar to partition.’ Hence it is clear that the fact that the plaintiffs are mokararidars and the defendants, or some of them, are proprietors, will not bar the partition sought for in this case. But the learned Judge in the body of his judgment observed—‘ as to the second ground, the only reason that might be urged in its support is that, if partition can be enforced as between co-owners whose interests are not co-ordinate in degree, parties having permanent interest may be put to frequent and needless expense and trouble by having to watch partition proceedings instituted at the instance of co-owners with temporary interest, such proceedings not leading to any division of the property which can have a lasting effect. But in the present case, no such reason can hold good in the first place, because the party who is asking for partition is the holder of the higher of the two kinds of interest respectively owned by the parties to the suit, his interest being that of a zemindar, so that there can be no apprehension of the division effected not having an enduring effect ; and, in the second place, because the interest owned by the party against whom partition is sought, though subordinate to that of the plaintiff, is certainly not of a temporary and qualified character such as would make it undesirable to have a partition against him and to subject him to the trouble and expense of a partition proceeding.’ Again, Mr. Justice Beverley in his judgment in the case has said : ‘ The right to a partition can only, in my opinion, exist as between co-parceners holding similar interests in the property.’ How ‘ similar interests ’ should be defined it may not be easy to say. They should probably be permanent, transferable interests. A temporary leaseholder of an undivided portion of an estate ought not, in my opinion, to be allowed to put his lessor to the trouble and expense of a partition.’

“ The rule to be deduced from these passages would seem to be that partition should not be allowed when the interest of one or more of the persons owning interests in the property to be partitioned is of a temporary and qualified character—is not a permanent and transferable interest—and when there may be apprehension that the division effected may not have an enduring effect.

“ Now, to apply these rules to this case. The interests of the holders of the *mokarari* in $7\frac{1}{2}$ annas share of the properties would seem to us not to be of a permanent and transferable nature, but to be rather of a temporary and qualified character, for two reasons : (1) that the *mokarari*, by the terms of the lease of the 16th September 1865, is to become null and void on default of payment of 3 instalments of the *mokarari* rent. Hence the *mokarari* may cease at any time.

“ Then there is a further clause prohibiting alienation subject to the same penalty. Alienation of part of the *mokarari* interest has no doubt taken place and been condoned, but on the defendants Nos. 2 to 4 instituting a suit to cancel the *mokarari* on the ground of this alienation, the present plaintiffs

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Nos. 1 to 3 at once compromised the matter with them by paying a bonus of Rs. 500 and costs, and obtaining a distribution of the rent. This was effected by the *ekrarnama* of 6th April 1896. But the defendants Nos. 2 to 4 do not appear to be bound to overlook and condone any future alienation of any other portion of the *mokarari* interest.

"In these circumstances, it seems to us that the interests of the plaintiffs in this case are not of such a permanent and transferable nature as to ensure that any division that may now be effected will be of enduring effect. For this reason we do not consider them entitled to partition against the wishes of the defendants Nos. 2 to 4.

"We accordingly set aside the decree of the Judge in the Court below and decree this appeal with costs."

On this appeal,

Kenworthy Brown, for the appellants, contended that the High Court had, in coming to the conclusion that the *mokarari* lease was not of a permanent and transferable character, put an erroneous construction upon it. The fact that it was liable to forfeiture in certain events did not alter the interest of the appellants in the lease, nor lessen their right to obtain partition as against the respondents. Persons possessed of only limited interests in property, and only in small portions of it, could maintain suits for partition against their co-owners. Reference was made to *Shamasoondari Debi v. Jardine Skinner and Co.* (1), *Sundar v. Parbati* (2), *Padmamani Dasi v. Jagadamba Dasi* (3), *Uma Soondari Debi v. Benode Lal Pakrashi* (4), *Mayfair Property Company v. Johnston* (5), *Gaskell v. Gaskell* (6), *Heaton v. Dearden* (7), and *Hobson v. Sherwood* (8). No doubt the appellants and respondents had different interests in the land, but had the High Court in this case given proper effect to the decision of a Full Bench of the same High Court in *Hemadri Nath Khan v. Ramani Kanta Roy* (9) the partition asked for should have been granted, notwithstanding that the interests were not co-ordinate in degree. Having regard to

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| (1) (1869) 3 B. L. R. App. 120 ;
12 W. R. 160. | (4) (1907) I. L. R. 34 Calc. 1026, 1028. |
| (2) (1889) I. L. R. 12 All. 51, 56 ;
L. R. 16 I. A. 186, 193, 194. | (5) [1894] 1 Ch. 508, 512. |
| (3) (1871) 6 B. L. R. 134, 138. | (6) (1836) 6 Simon 643, 644. |
| | (7) (1852) 16 Beav. 147, 150. |
| | (8) (1841) 4 Beav. 184. |
| | (9) (1897) I. L. R. 24 Calc. 575, 583. |

the terms and effect of the *ekrarnama* dated 6th April 1896, the High Court should have held that the respondents were bound to recognise the status of the appellants, and their claim should have been granted.

DeGruyther, K. C., and *S. A. Kyffin*, for the respondents (1), (2) and (3), contended that the appellants had no interest in the land, of which they claimed partition, sufficient to enable them to maintain that claim. As between themselves and the respondents the appellants were substituted lessees, as agreed between them on 6th April 1896. No recognition was made at that time of the private arrangement between the appellants made on 16th March 1878. The respondents were not bound to recognise a transfer of the *mokarari* interest made in violation of the conditions of the lease, but, on the contrary, they were entitled to cancel the lease for breach of covenant. It was, therefore, a forfeitable and not a permanent lease, and the appellants had only a tenure of a limited character which did not entitle them to demand partition. Reference was made to the Bengal Tenancy Act (VIII of 1885), section 88; the Estates Partition Act (Bengal Act V of 1897) section 3, sub-sections (5) and (7), and sections 6, 8, 23 and 99; and Bengal Regulation XIX of 1814 (Partition of Estates paying revenue to Government), section 4. The English cases cited were not applicable to the present case: see *Kally Dass Ahiri v. Mon-mohini Dassee* (1) and *Abhiram Goswami v. Shyama Charan Nandi* (2). Before it could be said they were applicable to India, it must be shown that the special Statutes on which those cases were decided, 31 Hen. VIII, Chap. I, and 32 Hen. VIII, Chap. 32, were made applicable. The appellants as lessees could not, it was submitted, compel a partition as against the respondents who were their lessors. Reference was made to *Ridai Nath Sandyal v. Iswar Chandra Sahu* (3), *Parbati Charan Deb v. Ainuddeen* (4), *Ruttunmonee Dutt v. Brojo Mohun Dutt* (5), *Lalljeet Singh v. Raj Coomar Singh* (6),

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(1) (1897) I. L. R. 24 Calc. 440, 446.

(2) (1909) I. L. R. 36 Calc. 1003, 1015.

(3) (1865) 4 B. L. R. App. 57 (nota.)

(4) (1881) I. L. R. 7 Calc. 577.

(5) (1874) 22 W. R. 333.

(6) (1873) 12 B. L. R. 373

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Shamasoonderi Debi v. Jardine Skinner and Co. (1), *Mukunda Lal Pal Chowdhury v. Ichuraur* (2), *Uma Soondari Debi v. Benode Lal Pakrashi* (3), *Sundar v. Parbati* (4) and *Hemadri Nath Khan v. Ramani Kanta Roy* (5) which, it was contended, was not decided on the present point.

Kenworthy Brown replied commenting on the cases cited for the respondents and referring in addition to Story's Equity Jurisprudence, section 648 : Stephen's Commentaries 15th Ed., Vol. I, page 241 : *Sriram Chakravarti v. Hari Narayan Singh Deo* (6), Bengal Tenancy Act (VIII of 1885), sections 3 and 5 : *Fatteh Bahadur v. Janki Bibi* (7) *per Kemp J*; *Barahi Debi v. Debkamini Debi* (8), *Ram Mohan Lal v. Mulchand* (9), *Ram Charan v. Ajulhia Prasad* (10), and *Subbarazu v. Venkataratnam* (11). [*DeCruyther, K.C.*, referred to the Bengal Tenancy Act, sections 3 and 188.]

July 15.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from the judgment and decree of the High Court of Calcutta, dated the 5th May 1905, which reversed those of the Subordinate Judge of Gaya, dated the 4th February 1904.

The sole question for decision on the appeal is whether the appellants are entitled to partition of certain properties as against the opposing respondents.

In order to dispose of this question, it is sufficient to deal very broadly with the facts. It is enough to say that the appellants are proprietors of a *mekarari* interest in the properties in question, the opposing respondents being owners of a fractional share in the zemindari interest in the same properties.

(1) (1869) 3 B. L. R. App. 129;
12 W. R. 190.

(2) (1892) I. L. R. 20 Calc. 379.

(3) (1907) I. L. R. 34 Calc. 1026, 1028.

(4) (1889) I. L. R. 12 All. 51, 56;

L. R. 16 I. A. 186, 193, 194.

(5) (1897) I. L. R. 24 Calc. 575, 583.

(6) (1905) I. L. R. 33 Calc. 54.

(7) (1870) 4 B. L. R. App. 53.

(8) (1892) I. L. R. 20 Calc. 682.

(9) (1905) I. L. R. 28 All. 36

(10) (1905) I. L. R. 28 All. 50.

(11) (1891) I. L. R. 15 Mad. 234.

In the judgment appealed against it was held, in accordance with an earlier decision of a Full Bench of the same Court, that the fact of the party on one side of the dispute being in a lower grade of title than those on the other side was not necessarily a bar to partition.

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Their Lordships agree with the opinion of the Full Bench, in the case referred to, that the right of partition exists when two parties are in joint possession of land under permanent titles, although those titles may not be identical. It is unnecessary for their Lordships to consider whether a right to partition exists in any other case, and they are desirous to avoid indicating any view upon any such subject.

In the present case all parties concerned in the appeal have joint shares in the land, of course under different titles, and this has been recognised by the learned Judges whose decision is under appeal. But those learned Judges held that the right of partition, which would otherwise have belonged to the appellants, the *mokararidars*, was lost by reason of the fact that their *mokarari* is liable to forfeiture in certain contingencies, and therefore is lacking in the permanence of interest necessary to support a claim for partition. Their Lordships are of opinion that the distinction thus introduced cannot be supported.

The title of the appellants is a permanent title, though liable to forfeiture in events which have not occurred, and the rights incidental to that title must, in their Lordships' opinion, be those which attach to it as it exists, without reference to what might be lost in future under changed circumstances.

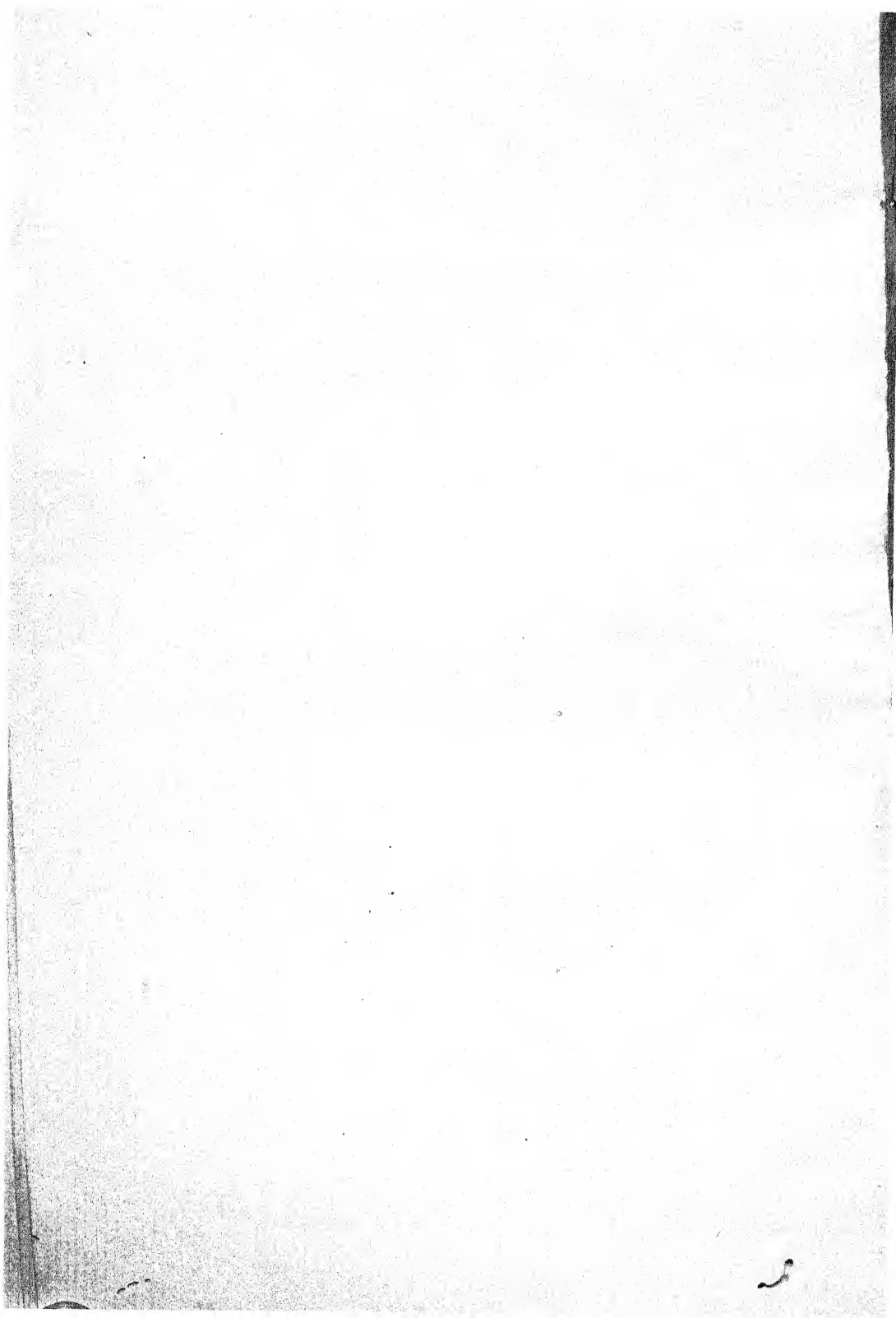
Their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the judgment and decree of the High Court should be set aside and that of the Subordinate Judge restored with costs in the Court below.

The opposing respondents will pay the costs of the present appeal.

Appeal allowed.

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for the respondents : *Broughton, Broughton & Holt.*



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Acquiescence—Order of demolition of unauthorised erections—Disobedience to such order—Negotiations for compromise—Re-assessment of the whole premises, including the unauthorized portions, and receipt of rates and taxes for the same—Calcutta Municipal Act (Beng. III of 1899) ss. 449, 580. Where, after the passing of an order of demolition under s. 449 of the Calcutta Municipal Act, negotiations have been going on between the person directed to demolish an unauthorized erection and the Corporation, the receipt of rates and taxes by the latter, on re-assessment of the whole premises, including the portions objected to, during the period of such negotiations, is not an acquiescence on their part in the continued disobedience to the order so as to disentitle them from proceeding with the prosecution for such disobedience after the failure of the negotiations. LACHMI NARAYAN MAHTO v. CORPORATION OF CALCUTTA (1910) I. L. R. 37 Calc. ...	833
Acquittal—Acquittal under s. 182 of the Penal Code—Subsequent complaint under s. 500, by the person defamed, in respect of the same statement—Subsequent prosecution not barred—Criminal Procedure Code (Act V of 1898) s. 403. An acquittal under s. 182 of the Penal Code in respect of false information contained in a petition to the manager of an estate	

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is no bar to a subsequent prosecution for defamation under s. 500 of the Penal Code, on the same statements. *Sharbekhan Gohain v. Emperor*, 10 C. W. N. 85, distinguished. *RAMSEBAK LAL v. MUNESWAR SINGH* (1910) I. L. R. 37 Calc. ...

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—*Previous acquittal, plea of—Acquittal of some accused charged with rioting, grievous hurt and murder—Liability of others to be tried for the same offences—Prosecution story found to be false as to the grievous hurt and murder—Criminal Procedure Code (Act V of 1898) s. 403. An acquittal of some of the accused on charges of rioting armed with deadly weapons, grievous hurt and murder, is no bar, under s. 403 of the Criminal Procedure Code, to the trial of others concerned in the same offences. Where the Sessions Judge was of opinion, at the original trial, that the prosecution story as to the manner in which the deceased met his death, did not represent the truth and acquitted the accused, though he did not disbelieve the fact of a rioting having occurred, while one of the Assessors believed the whole story :—Held, that the High Court would not interfere with a pending prosecution against others for the same offences. *Bishun Das Ghosh v. King-Emperor*, 7 C. W. N. 493, distinguished. *KORAI SARDAR v. MEHER KHAN* (1910) I. L. R. 37 Calc. ...*

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Act 1841—XIX : *See* SUCCESSION (PROPERTY PROTECTION) ACT.

—**1859—VIII :** *See* CIVIL PROCEDURE CODE.

- Act 1860—XLV :** See PENAL CODE.
- 1864—XVII :** See OFFICIAL TRUSTEE'S ACT.
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- 1866—XXVIII :** See TRUSTEES' AND MORTGAGEES' POWERS ACT.
- 1869—IV :** See DIVORCE ACT.
- 1870—VII :** See COURT-FEES ACT.
- 1870—XXI :** See HINDU WILLS ACT.
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- 1873—X :** See OATHS ACT.
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- 1877—III :** See REGISTRATION ACT.
- 1877—XV :** See LIMITATION ACT.
- 1878—I :** See OPIUM ACT.
- 1879—XVIII :** See LEGAL PRACTITIONERS ACT.
- 1881—V :** See PROBATE AND ADMINISTRATION ACT.
- 1882—IV :** See TRANSFER OF PROPERTY ACT.
- 1882—XIV :** See CIVIL PROCEDURE CODE.
- 1882—XV :** See PRESIDENCY SMALL CAUSE COURTS ACT.
- 1885—VIII :** See BENGAL TENANCY ACT.
- 1886—XIII :** See SECURITIES ACT.
- 1889—VII :** See SUCCESSION CERTIFICATE ACT.
- 1898—V :** See CRIMINAL PROCEDURE CODE.
- 1899—II :** See STAMP ACT.
- 1901—VI :** See ASSAM LABOUR AND EMIGRATION ACT.
- 1908—V :** See CIVIL PROCEDURE CODE.
- 1908—IX :** See LIMITATION ACT.
- 1908—XIV :** See CRIMINAL LAW AMENDMENT ACT.

Adoption—Valuation of suit—Suit to set aside Adoption—Munsif, jurisdiction of—Forum—Practice.

Adoption—*concl.*

According to a long-standing practice, a suit to set aside an adoption is, for the purposes of jurisdiction, incapable of valuation: and it is competent to the plaintiff in such a suit to value the relief claimed, and that valuation determines the forum to decide the suit. *Aklemannessa Bibi v. Mahomed Hatem*, I. L. R. 31 Calc. 849, commented on. *Jan Mahomed Mandal v. Mashar Bibi*, I. L. R. 34 Calc. 352, referred to. *PRAHLAD CHANDRA DAS v. DWARKA NATH GHOSE* (1910) I. L. R. 37 Calc. ...

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Addition of Parties : See PARTIES ... 229

Additions to Buildings : See DEMOLITION OF BUILDING ... 585

Admissions to Police : See JURY, RIGHT OF TRIAL BY ... 467

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See LIMITATION ... 885

Adverse Rights in two capacities : See LANDLORD AND TENANT ... 70

Affidavit—Practice—Grounds of belief
—*Civil Procedure Code (Act V of 1908), order XIX, rule 3—Jurisdiction—Rehearing.* The provisions of order XIX, rule 3 of the Code of Civil Procedure, must be strictly observed: every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity. The Court has inherent jurisdiction to rehear a matter before the order passed by the Court at a previous hearing has been perfected. *PADMABATI DAS v. RASIK LAL DHAR* (1909) I. L. R. 37 Calc. ... 259

Agent, acceptance of bribe or commission by : See PRINCIPAL AND AGENT ... 81

Appeal—Appeal from order dismissing suit under s. 102, Civil Procedure Code (Act XIV of 1882)—Suit in which two distinct claims were made—Claim to recover money paid to release attachment disallowed—Claim for damages for wrongful attachment withdrawn—Non-appearance of plaintiff—Improper procedure in dismissing

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suit for default—Remand. The plaintiff (appellant) made two claims, one for money paid into Court to release from attachment property which he alleged he had purchased, but which had been attached as belonging to the Delhi Cotton Mills Company against which the defendant (respondent) held a decree: and the other for damages for the wrongful attachment. As to the former claim, the District Judge ruled "that the payment was entirely voluntary and for plaintiff's own interests, and that his remedy is under ss. 69 and 70 of the Contract Act against the Delhi Cotton Mills, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment." Evidence was proceeded with on the claim for damages, and after unsuccessfully petitioning that a decree might be drawn up in respect of the dismissal of his claim to the money paid into Court, and for leave to withdraw his claim for damages under s. 373 of the Civil Procedure Code (Act XIV of 1882), with liberty to bring a fresh suit, the plaintiff unconditionally withdrew from the claim for damages, but not from the claim to the recovery of the money paid. Subsequently, the defendant proceeded to give evidence upon the issues raised in the case, and eventually, the plaintiff not appearing, the District Judge dismissed the whole case for default under s. 102 of the Code. On appeal to the Chief Court, the majority of a Full Bench of that Court decided that no appeal lay from an order dismissing a suit under s. 102, and the appeal was consequently dismissed:—*Held* by the Judicial Committee, that after the decision of the District Judge adverse to the plaintiff on the claim to recover the money paid, which left no question as to that claim open in the Court of first instance, and the abandonment by the plaintiff of the claim to damages, there remained nothing in substance to be tried; and that the case was

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one not proper to be dealt with under s. 102. Without deciding (as being, therefore, unnecessary) the question whether an appeal would lie against a dismissal regularly made under that section, their Lordships remanded the case to the Chief Court to decide the appeal on its merits. *KANHYA LAL v. THE NATIONAL BANK OF INDIA* (1910) I. L. R. 37 Calc. ... 420

Appeal, valuation of—Court-fees Act (VII of 1870) s. 4, Sch. I, Art. 1, and Sch. II, Art. 17, cl. (6)—Valuation of appeal when no amount claimed, but liability of certain properties disputed—Memorandum of appeal—Taxing Officer—Acceptance of court-fee by Deputy Registrar, finality of. Where the appellant in an appeal against a mortgage decree does not dispute the amount decreed, but raises the question of the liability of certain properties, the value of the appeal for the purpose of the court-fees is the value of such properties. Sch. II, Art. 17, cl. (6) of the Court-fees Act (VII of 1870) has no application to such a case. *Kesavarapu Ramakrishna Reddi v. Kotta Kota Reddi*, I. L. R. 30 Mad. 96, *Bunwari Lal v. Daya Sunker Misser*, 13 C. W. N. 815, referred to. A memorandum of appeal was admitted by the Deputy Registrar of the High Court, and no question was raised as to the sufficiency of the court-fees. At the hearing of the appeal, it was objected on behalf of the respondents that the court-fee was insufficient:—*Held*, that there having been no decision under s. 5 of the Act by the Taxing Officer, who was the Registrar of the High Court, it was open to the respondents to raise the objection at the hearing of the appeal. *Kasturi Chetti v. Deputy Collector, Bellary*, I. L. R. 21 Mad. 269, referred to. *JUGAL PERSHAD SINGH v. PARBEU NARAIN JHA*, (1910) I. L. R. 37 Calc. ... 914

Appellate Court, direction by, to add parties: See *REMAND* ... 171

Arable Land: See *ASSESSMENT, EX-EMPTION FROM* ... 697

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Arbitration — <i>Private reference</i> — <i>Award</i> — <i>Reference by some of the disputing parties, effect of</i> — <i>Civil Procedure Code (Act XIV of 1882) s. 506.</i> Upon a suit brought by the plaintiffs for recovery of possession of certain lands, the defence raised was that the plaintiffs were bound by an award which was made upon a private reference to arbitration, to which some of the plaintiffs and the defendants were parties :— <i>Held</i> , that the award was binding as between those plaintiffs and the defendants who were parties to the reference. <i>JADUNATH CHOWDHRY v. KAILAS CHANDRA BHATTACHARJEE</i> (1909) I. L. R. 37 Calc. ... 63		Assessment of Rent by Collector : <i>See</i> CHAUKIDARI CHAKRAN LAND ... 598	
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Assam Labour and Emigration Act (VI of 1901) s. 164 : <i>See</i> EMIGRATION ... 27		Attachment : <i>See</i> DISPUTE CONCERNING LAND ... 331	
Assessment — <i>Bengal Municipal Act (Beng. III of 1884) s. 116</i> — <i>Civil Court, jurisdiction of</i> — <i>Ultra vires.</i> Under s. 116 of the Bengal Municipal Act, the decision of the Objection Committee in matters regarding the amount of assessment is final, and the Civil Court has no jurisdiction to interfere in such matters. It can only interfere when the assessment is <i>ultra vires.</i> <i>Manessur Das v. The Collector and Municipal Commissioners of Chapra</i> , I. L. R. 1 Calc. 409, referred to. <i>Naradip Chandra Pal v. Purnananda Saha</i> , 3 C. W. N. 73, and <i>Kameshwar Pershad v. The Chairman of the Bhabua Municipality</i> , I. L. R. 27 Calc. 849, distinguished. <i>CHAIRMAN, MUNICIPAL BOARD, CHAPRA, v. BASUDEO NARAIN SINGH</i> (1910) I. L. R. 37 Calc. ... 374		Attachment before judgment : <i>See</i> DIVORCE ... 613	
Assessment, exemption from — <i>Bengal Municipal Act (Beng. III of 1884) ss. 6, cl. 3, 85</i> — <i>Arable land</i> — <i>"Holding"</i> — <i>Bengal Municipal (Amendment) Act of 1894. s. 36.</i> The word "holding" in the Bengal Municipal Act, 1884, is wide enough to cover arable land, which is, therefore, liable to be assessed under the provisions of the Act. <i>MAHADEB AON v. CHAIRMAN OF THE HOWRAH MUNICIPALITY</i> (1910) I. L. R. 37 Calc. ... 697		Attestation — <i>Document, execution of</i> — <i>Attesting Witness</i> — <i>Transfer of Property Act (IV of 1882) s. 59</i> — <i>Whether one joint executant of a deed can be treated as an attesting witness to the signature of the other</i> — <i>Purdanashin lady, whether an attesting witness should actually see the signature made, or the mark affixed by.</i> When a document is jointly executed by more than one person in the presence of each other, each executant cannot be treated as an attesting witness in respect of the signature of every other executant. For the purpose of valid attestation under s. 59 of the Transfer of Property Act, it is not essential that the witnesses should actually see the signature made, or the mark, seal or thumb impression affixed, but it would be sufficient if the execution took place in the presence of the witnesses, although the executants were screened off from the gaze of the witnesses themselves. <i>SARUP JIGAR BEGUM v. BARADA KANTA MITTER</i> (1910) I. L. R. 37 Calc. ... 526	
		Attesting Witness : <i>See</i> ATTESTATION ... 526	
		Auction-purchaser, right of : <i>See</i> INCUMBRANCE ... 322	
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		Ayautuka Stridhan : <i>See</i> HINDU LAW ... 863	
		Bail — <i>High Court, jurisdiction of, to grant bail</i> — <i>Grounds of bail</i> — <i>Sufficient cause for further inquiry into guilt of accused</i> — <i>Undue delay</i> — <i>Taking cognizance</i> — <i>Application of special procedure to the case</i> — <i>Power of the Lieutenant-Governor</i> — <i>Criminal Procedure Code (Act V of 1898) ss. 190, 497, 498</i> — <i>Criminal Law Amendment Act (XIV of 1908) ss. 2, 12, 14 (1).</i> The power of the High Court to grant bail "in any case" under	

Bail—concl'd.

s. 498 of the Criminal Procedure Code is not affected by Act XIV of 1908, but the Court ought, in the exercise of its discretion, to take into consideration the limitation imposed by s. 12 of the latter. The High Court refused bail where it appeared from the record and the Magistrate's explanation that there was cause for further inquiry into the case against the petitioner, and that there had been till then no undue delay in the proceedings. Where a police report of a dacoity was submitted to the Sub-divisional Officer of Diamond Harbour on the 24th April 1909, the date of the dacoity, and the case was subsequently withdrawn by the District Magistrate to his own file, and on the 20th January 1910 an order was made by the Lieutenant-Governor in terms of s. 2 of Act XIV of 1908, applying the provisions of Part I to the case:—*Held*, that the latter Magistrate had taken cognizance, and that the Lieutenant-Governor had power to make the order. *EMPEROR v. SOURINDRA MOHAN CHUCKERBUTTY* (1910) I. L. R. 37 Calc.

— *Power of Sessions Judge to grant bail in cases to which special procedure has been applied—Criminal Procedure Code (Act V of 1898) ss. 497, 498—Criminal Law Amendment Act (XIV of 1908) ss. 12, 14 (1).* The power of the Sessions Judge to grant bail under s. 498 of the Criminal Procedure Code is, in cases to which the provisions of Part I of Act XIV of 1908 have been applied by s. 2 thereof, abrogated by s. 14 of that Act. *EMPEROR v. LALIT KUMAR CHATTERJEE* (1910) I. L. R. 37 Calc.

Bengal Act 1859—XI, s. 33 : *See* SALE FOR ARREARS OF REVENUE

— **1868—VII, ss. 8, 11 :** *See* SALE FOR ARREARS OF REVENUE

— **1879—VI :** *See* VILLAGE CHAUKIDARI ACT

— **1879—VI, s. 50 :** *See* CHAUKIDARI CHAKKAN LANDS

— **1876—VIII :** *See* ESTATES PARTITION ACT.

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Bengal Act 1884—III : *See* BENGAL MUNICIPAL ACT.

— **1885—I :** *See* BENGAL FERRIES ACT

— **1885—III :** *See* BENGAL LOCAL SELF-GOVERNMENT ACT.

— **1894—IV :** *See* BENGAL MUNICIPAL (AMENDMENT) ACT.

— **1895—I :** *See* PUBLIC DEMANDS RECOVERY ACT.

— **1899—III :** *See* CALCUTTA MUNICIPAL ACT

— **1899—III :** *See* CALCUTTA MUNICIPAL ACT, ss. 444, 574 ...

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Bengal Ferries Act (Beng. I of 1885) ss. 6, 16, 28 : *See* FERRY ...

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Bengal Municipal Act (Beng. III of 1884) ss. 6, cl. 3, 85 : *See* ASSESSMENT, EXEMPTION FROM ...

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— **ss. 46, 112, 113 114, and 351**

A—Appointment of a paid Assessor at a meeting of the Commissioners within six months from the date of a lost amendment at a previous meeting, effect of—Assessment by such an officer, confirmed by the Appeal Committee, whether impeachable—Rule 33 of the Model Rules under s. 351A of the Act. The question of appointing a paid assessor under s. 46 of the Bengal Municipal Act (Beng. III of 1884) was raised at a meeting of Municipal Commissioners, as an amendment to a substantive motion; the amendment was lost; but the same question was again raised as a substantive proposition within six months from the date of the first meeting; the proposal being carried, an assessor was appointed who revised the assessment of the plaintiff. The plaintiff applied for a review under s. 113, but the assessment was confirmed under s. 114 of the Act:—*Held*, that the appointment of the paid assessor was not *ultra vires*, inasmuch as the subject of the appointment of an assessor had not been finally disposed of at the first meeting, and therefore its reconsideration was permissible; and that, whether the assessor was or was not

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legally qualified to make any assessment, the validity of such an assessment, when once confirmed by the Appeal Committee under s. 114 of the Act, could not be impeached. CHAIRMAN OF CHITTAGONG MUNICIPALITY v. JOGESH CHANDRA RAI (1909) I. L. R. 37 Calc. ...	44
— s. 116 : See ASSESSMENT	374
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Bengal Survey Act (Beng. V of 1875) s. 41 : See DISPUTE CONCERNING LAND ...	331
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— ss. 341 (1), 450 (3), 574 (c), 631—Notice to remove fixture—Disobedience of requisition—Application by General Committee to Magistrate for removal of fixture—Criminal prosecution for offence not instituted—Limitation of time for criminal prosecution. Section 631 of the Calcutta Municipal Act applies only to a criminal prosecution instituted against a person under s. 574 (c) for non-compliance with a requisition under s. 341 (1) in the regular way, that is, on complaint as defined in s. 4 of the Criminal Procedure Code, and not to a proceeding taken under s. 450 (3) by the Magistrate on the application of the General Committee in respect of such non-compliance. SARAT CHANDRA MUKERJEE v. THE CORPORATION OF CALCUTTA (1910) I. L. R. 37 Calc. ...	384
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Central Provinces Land Revenue Act (XVIII of 1881) ss. 112, 152 : See LAMBARDAR ...	694
Certificate of Sale—Revenue Court, jurisdiction of—Public Demand Recovery Act (Beng. I of 1895) ss. 12, 15, 17, 24, 26—Sale by Collector, while deposit in treasury—Sale by Revenue Authorities without jurisdiction—Validity of sale against bona-fide purchaser without notice—Whether civil suit lies to set aside sale—Speculative Purchaser—Hardship. A certificate which has been properly made for arrears actually due can be cancelled or modified only on the ground that the amount stated was either never due, or, if	

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Certificate of Sale—*concl'd.*

due, had been paid before the certificate was made; and ss. 12 and 15 of the Public Demands Recovery Act do not apply when the sale is held without jurisdiction, the amount due under the certificate having been paid before the sale. When the sale was held by the Revenue Authorities without jurisdiction, it can not be treated as one made under the provisions of the Public Demands Recovery Act, and may consequently be challenged by a civil suit without recourse to procedure provided by the Act. *Balkishan Das v. Simpson*, I. L. R. 25 Calc. 833, *Bajjnath Sahu v. Lala Sital Prasad*, 2 B. L. R. 1 (F. B.); 10 W. R. 66 (F. B.), and *Harkhoo Singh v. Bunsidhur Singh*, I. L. R. 25 Calc. 876, followed. Where a sale has taken place on the basis of a satisfied judgment, the satisfaction of which has been certified to the Court, the sale is void and ineffectual to pass any title even to a *bona-fide* purchaser for value without notice. A Certificate Officer has authority to sell only so long as the certificate remains unpaid, and a duty is cast upon him by law to enter satisfaction as soon as payment has been made. *Rewa Mahton v. Ram Kishen Singh*, I. L. R. 14 Calc. 18; L. R. 13 I. A. 106, *Mothura Mohun v. Akhoy Kumar*, I. L. R. 15 Calc. 557, and *Yellappa v. Ranchandra*, I. L. R. 21 Bom. 463, distinguished. No case of hardship arises where a person with eyes open makes a speculative purchase of a valuable estate for a nominal price. *Bajjnath v. Rangut*, 5 C. L. J. 687, affirmed by the Judicial Committee, I. L. R. 23 Calc. 775, followed. *JANAKDHARI LAL v. GOSSAIN LAL BHAYA GAYWAL* (1909) I. L. R. 37 Calc. ... 107

Chaukidari Chakran Land—Village Chaukidari Act (Bengal VI of 1870) s. 49—Assessment of rent by Collector—Right of landlord to claim fair and equitable rent. The right of a landlord to claim rent, when making a settlement of resumed *chaukidari chakran* lands with a putnidar, is not restricted

Chaukidari Chakran Land—*concl'd*

to the amount of assessment made by the Collector under s. 49 of the Village Chaukidari Act (Beng. Act VI of 1870); he is entitled to claim a fair and equitable rent. *Hari Narain Mozumdar v. Mukund Lal Munda*, 4 C. W. N. 814, and *Kazi Newaz Khoda v. Ram Judu Dey*, I. L. R. 34 Calc. 109; 5 C. L. J. 33, referred to. *GOPENDRA CHANDRA MITTER v. TARAPRASSANNA MUKERJEE* (1910) I. L. R. 37 Calc. ... 598

—Bengal Act VI of 1870, s. 50—Resumption and transfer by Government—Rights of patnidars and darpatnidars—Suit for recovery of khas possession—Frame of suit—Specific performance of contract—Landlord and Tenant. Where *chaukidari chakran* lands had been resumed by the Government and settled under s. 50 of Bengal Act VI of 1870, with a zemindar who had created a patni under which there was a dar-patni and who made a rayati settlement, and the dar-patnidars brought a suit against the zemindars for khas possession of the lands and for the execution of a deed of transfer, on the allegation that the zemindar had transferred his rights in the said lands to the patnidars and the patnidars had similarly transferred all their rights, subject, of course, to the payment of the respective head rents:—*Held*, that the joining of the two prayers for execution of a deed of transfer and for recovery of possession was in no way repugnant to any rule of law. *Nathu Pandu v. Budhu Bhika*, I. L. R. 18 Bom. 537, and *Narayana Kavirayan v. Kandasami Goundan*, I. L. R. 22 Mad. 24, referred to. *RANJIT SINGH v. KALIDAS DEBI* (1909) I. L. R. 37 Calc. ... 57

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without impeding the passage along it—Continuing Offence—Daily Fine. Where a bye-law passed by the District Board prohibited encroachment on any part of a road maintained by it, or its slopes or side-ditches, by the placing of fences thereon:—*Held*, that the erection of a fence along the slope and the edge of such road, without impeding the passage over it, is an infringement of the bye-law, though the Board has no proprietary right in the road, or in the land on which its slopes or side-ditches stand. A sentence of a daily fine in anticipation, in the case of a continuing offence which may be committed after the date of the proceeding in which it was passed, is illegal. *NILMANI GHATAK v. EMPEROR* (1910) I. L. R. 37 Calc. ... 671

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to answer"—Evidence Act (I of 1872) s. 132, proviso. An incriminating statement in a deposition made by a party to the suit in cross-examination in answer to questions relevant only as affecting his credit, and objected to, not by the deponent himself but by his pleader, is not admissible against him on his subsequent trial for giving false evidence, he being in fact "compelled to answer" within the meaning of s. 132 of the Evidence Act. Such objection may be taken by counsel or pleader representing the party. <i>Thomas v. Newton</i> , 1 Moo. & M. 48n., and <i>Rez v. Adey</i> , 1 Moo. & Rob. 94, distinguished. <i>Queen v. Gopal Dass</i> , I. L. R. 3 Mad. 271, explained and distinguished. <i>Per TEUNON J.</i> When such an objection has been taken and overruled, if any objection or privilege personal to the witness remains, it is still open to him to assert that objection or claim that privilege. <i>EMPEROR v. PRAMATHA NATH BOSE</i> (1910) I. L. R. 37 Calc. ...	878	First Information : See CRIMINAL PROCEEDINGS, INSTITUTION OF ...	49
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possibly may not, administer oaths to persons of whom he may make enquiry. If he makes an order under s. 3, proceedings for disobedience must be taken independently under s. 6, and conducted according to the ordinary procedure prescribed for the trial of offences. *RAJANI KHEMTAWALI v. PRAMATHA NATH CHOWDHRY* (1910) I. L. R. 37 Cal. ... 287

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Punjab of debtors who have, by an order under the Act, been declared insolvents, the Court is entrusted (by s. 27) with more or less administrative powers with regard to it, and no transfer of the property takes place: *Held*, therefore, by the Judicial Committee (reversing the decision of the Chief Court), that where such an order had been made by the Insolvent Estates Court at Amritsar in respect of certain debtors carrying on business at (amongst other places) Amritsar and Bombay, and a Receiver of their property had been appointed by the Court, a subsequent order of the High Court of Bombay in its Insolvency Jurisdiction, made under the Indian Insolvency Act (11 and 12 Vict., C. 21), declaring the same debtors insolvents and vesting their property in the Official Assignee of Bombay, had the effect, notwithstanding that it was of later date than the order of the Punjab Court, of vesting all the property of the debtors, including that in the Punjab, in the Official Assignee of Bombay. The High Court had rightly held that the Insolvent-debtor sections of the Civil Procedure Code (Act XIV of 1882) were not applicable to the case. *OFFICIAL ASSIGNEE, BOMBAY, v. REGISTRAR, SMALL CAUSE COURT, AMRITSAR* (1910) I. L. R. 37 Calc. ... 418

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----- <i>Preliminary inquiry by an Assistant Settlement Officer to determine whether a prosecution should be directed—Power to take evidence on oath in such inquiry—False evidence in the course of the inquiry—Criminal Procedure Code (Act V of 1898) ss. 4 (m) and 476—Indian Penal Code (Act XLV of 1860) s. 193 and Explanation (2)—Oaths Act (X of 1873) s. 4—Government Rules under the Bengal Tenancy Act (VIII of 1885), Rule 40. A Court holding a preliminary inquiry under s. 476 of the Criminal Procedure Code may legally take evidence on oath therein, and the inquiry is, therefore, a "judicial proceeding" within the terms of s. 4 (m) of the Code. Raghooburns Sahoy v. Kokil Singh, I. L. R. 17 Calc. 872, and Emperor v. Gopal Barik, I. L. R. 34 Calc. 42, referred to. Such an inquiry is also a stage of a judicial proceeding under Explanation 2 to s. 193 of the Penal Code, and a person giving false evidence in the course of it commits an offence under the section. Under s. 4 of the Oaths Act and Rule 40 (a) of the Government Rules framed under the Bengal Tenancy Act, a Settlement Officer has the power to receive evidence on oath, and is competent to hold a preliminary inquiry under s. 476 of the Criminal Procedure Code. ABDULLAH KHAN v. EMPEROR (1909) I. L. R. 37 Calc. ...</i>	52
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Order directing prosecution for instituting a false case—false information to the police—Subsequent complaint before the Magistrate—Grounds of the exercise of such jurisdiction—Criminal Procedure Code (Act V of 1898) ss. 195 (b) and 476. Section 476 of the Criminal Procedure Code must be read subject to the restrictions contained in section 195 (b), and does not, therefore, empower a Court to direct a prosecution for making false charge before the police. Dharmadas Kewar v. King-Emperor , 7 C. L. J. 373, followed, Lalji Gope v. Giridhari Chaudhury , 5, C. W. N. 106, referred to. In re Devji , I. L. R. 18 Bom. 581; Akhil Chandra De v. Queen-Empress , I. L. R. 22 Calc. 1004; Abdul Rahman v. Emperor , 7 C. L. J. 371, and Haibat Khan v. Emperor , I. L. R. 33 Calc. 30, distinguished. But if the informant, upon the police reporting the information to be false, subsequently petitions the Magistrate for a judicial inquiry, he must be taken to have preferred a complaint, and s. 476 would then apply. Queen-Empress v. Sham Lal , I. L. R. 14 Calc. 707; Queen Empress v. Sheikh Beari , I. L. R. 10 Mad. 232, and Jogendra Nath Mookerjee v. Emperor I. L. R. 33 Calc. 1, referred to. No sanction should be granted, or prosecution directed, unless there is a reasonable probability of conviction, though the authority granting a sanction under s. 195, or taking action under s. 476, should not decide the question of guilt or innocence. Great care and caution are required before the Criminal law is set in motion, and there must be a reasonable foundation for the charge in respect of which a prosecution is sanctioned or directed. Ishri Prasad v. Sham Lal , I. L. R. 7 All. 871; Kali Charan Lal v. Basudeo Narain Singh , 12 C. W. N. 3, and Queen v. Baijoo Lal , I. L. R. 1 Calc. 450, referred to. Where there had been prolonged litigation between the petitioner and the opposite party, in which the	

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former had been successful, so that the case was by no means improbable, and two Magistrates had, in the course of the judicial investigations preceding the trial, accepted the prosecution story as substantially true, and the Assessors had only found the case not proved:— <i>Held</i> , that, under the circumstances, it was not a proper case for a prosecution under s. 476 of the Code. <i>JADU NANDAN SINGH v. EMPEROR</i> (1909) I. L. R. 37 Calc. ...	250	<i>transaction—Confessions, admissibility of—Confessions made during police investigation and to Magistrate subsequently holding inquiry—Examination of accused—Eliciting statements by questions—Admissions to the police—Handwriting, modes of proof of—Comparison of handwriting—Leading questions—Criminal Procedure Code (Act V of 1898) ss. 164, 196, 235, 239, 342, 364, 447, 454, 532—Evidence Act (I of 1872) ss. 21, 25, 29, 47, 67, 73—Waging war—Conspiracy to wage war—Penal Code (Act XLV of 1860) ss. 121, 121A. The Criminal Procedure Code, in so far as it interferes with the mode of trial by Jury, is not ultra vires under the proviso to s. 22 of the Indian Council's Act (24 & 25 Vic., c. 67). <i>King-Emperor v. Kartik Chandra Dutt</i> (1909) unreported, followed. <i>In the matter of Ameer Khan</i>, 6 B. L. R. 392 and 459, approved of. An European British subject can, under s. 454 of the Code, relinquish his right to be dealt with as such. Where the Magistrate explained to such a person the nature of the charges framed against him, and his rights under ss. 447 and 450, and then asked him whether he claimed to be dealt with as such, and the latter stated that he did not claim the right:—<i>Held</i>, that he had relinquished his right. <i>In re Quiros</i>, I. L. R. 6 Calc. 83, <i>Queen-Empress v. Grant</i>, I. L. R. 12 Bom. 561, <i>Queen-Empress v. Bartlett</i>, I. L. R. 16 Mad. 308, followed. Where an order under s. 196 of the Criminal Procedure Code authorized a particular police officer to prefer a complaint of offences under ss. 121a, 122, 123 and 124 of the Penal Code, "or under any other section of the said Code which may be found applicable to the case," and the examination of the complainant also referred to the same sections:—<i>Held</i>, that no complaint under s. 121 of the Penal Code was thereby authorized by the Local Government or in fact preferred, that the Magistrate</i>	
Jurisdiction of Magistrate— <i>Cognizance on information received by him in another public capacity—Legality of the institution of criminal proceedings in such case—Criminal Procedure Code (Act V of 1898) s. 190 (1) (c). Held per Stephen J. (Carnduff J. dubitante)</i> , that a Magistrate who has received information in another public capacity, e.g., as manager of an encumbered estate, of the offence of mischief by cutting timber from the estate forest, cannot act on it in his capacity of a Magistrate and initiate criminal proceedings under s. 190 (1) (c) of the Criminal Procedure Code. <i>Thakur Pershad Singh v. Emperor</i> , 10 C. W. N. 775, referred to. An order, on taking cognizance of a case under s. 426 of the Penal Code, directing the attachment of trees, the subject of the alleged offence, is without jurisdiction. <i>LAKHI NARAYAN GHOSE v. EMPEROR</i> (1910) I. L. R. 37 Calc. ...	221		
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had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court, authorizing a complaint under the section which was not in fact made thereafter; nor did s. 532 of the Criminal Procedure Code apply in such a case. *Sham v. Khan's case*, (1890) Punj. R. Cr. J. No. 16, approved of. *Queen-Empress v. Morton*, I. L. R. 9 Bom. 288, distinguished, and *Queen-Empress v. Bai Gangadhar Tilak*, I. L. R. 22 Bom. 112, dissented from. The Local Government cannot delegate to any other body or person the controlling power and discretion of determining whether cognizance shall be taken by the Court of an offence mentioned in s. 196 of the Criminal Procedure Code, and its judgment must be specifically directed to the particular section, and no other, under which the prosecution is to be carried on, and the order or authority should be preceded by a deliberate determination in this respect. An order authorizing a complaint under certain specified sections "or under any other sections found applicable," if it means found by any one other than Government, involves a delegation which cannot be sustained. Where the accused were all alleged to have been members of a secret society, with its head-quarters in Manik-tolla in the suburbs, and its places of meeting in Calcutta and elsewhere, and to have joined in the unlawful enterprise, and with others, known and unknown, to have conspired to wage war or to deprive the King of the sovereignty of British India, and to have collected arms and ammunition with such intent and to have actually waged war:—*Held*, that the joint trial of the accused on charges under ss. 121, 121A, 122 and 123 of the Penal Code was not bad for misjoinder of persons or charges. A confession under s. 164 of the Criminal Procedure Code must be made either

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in the course of an investigation under Chapter XIV or after it has ceased and before the commencement of the inquiry or trial. The condition requiring the confession to be prior to the commencement of the inquiry or trial is only imposed when the investigation has ceased, and not when it is made in the course of the police investigation. Where a number of persons were arrested on the 1st May, and the confessions of some of them were recorded on the 4th and 5th, while others were brought in subsequently and their confessions taken while the police investigation was then actually going on, and on the 17th an order under s. 196 was obtained and the police report sent in, and on the next day the examination of the prosecution witnesses begun:—*Held*, that the Magistrate did not take cognizance under s. 190 of the Code, nor did the inquiry commence on the 4th, and that the confessions were taken in the course of an investigation under Chapter XIV. The fact that the Magistrate who has taken the confessions, afterwards holds the inquiry, does not, under s. 164, constitute the recording of the confessions an examination of the accused in the course of it and at its commencement. *Empress v. Anuntram Singh*, I. L. R. 5 Calc. 954, and *Empress v. Yakub Khan*, I. L. R. 5 All. 253, declared obsolete. *Sat Narain Tewari v. Emperor*, I. L. R. 32 Calc. 1083, distinguished. Section 164 includes confessions taken by a Magistrate who afterwards holds such inquiry or trial. *Empress v. Anuntram Singh*, I. L. R. 5 Calc. 954, and *Reg. v. Bai Ratan*, 10 Bom. H. C. 166, declared obsolete on the point. Sections 164, 342 and 364 of the Code are not exhaustive, and do not limit the generality of s. 21 of the Evidence Act as to the relevancy of admissions. *Queen-Empress v. Narayan* (1893) Ratan Lal Unrep. Cr. C. 679, referred to. The mere fact that a statement

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was elicited by a question does not make it irrelevant as a confession under s. 164 of the Criminal Procedure Code or s. 29 of the Evidence Act, though such fact may be material on the question of its voluntariness. Methods of proving handwriting discussed. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear. Section 73 of the Evidence Act does not sanction the comparison of any two documents, but requires, first, that the standard writing shall be admitted or proved to be that of the person to whom it is attributed; and, secondly, that the disputed writing must *itself purport* to have been written by the same person. A comparison of handwriting is at all times, as a mode of proof, hazardous and inconclusive, and especially so when made by one not conversant with the subject and without guidance from the arguments of counsel and evidence of experts. *Phoodie Bibee v. Gobind Chunder Roy*, 22 W. R. 272, referred to. The value of expert evidence of handwriting discussed. *Reg. v. Harvey*, 11 Cox C. C. 546, referred to. To constitute an admission, the document need not be written by the party against whom it is used: it is sufficient if it is found in his possession, and his conduct thereto creates an inference that he was aware of its contents and admitted their accuracy; but, unless this is done, the document cannot be used against him as proof of its contents. What conduct would properly give rise to such inference depends on the facts of each case. The mere fact of possession of letters is not of much value, unless it is shown that their contents were recognized and adopted by the replies elicited or the conduct inspired by them. The expression "*wages war*" in s. 121 of the Penal Code must be construed in its ordinary sense, and a conspiracy to

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wage war, or the collection of men, arms and ammunition for that purpose, is not waging war. An agreement between two or more persons to do all or any of the unlawful acts mentioned in s. 124A of the Penal Code is an offence, and the fact of the purpose not being immediate is only material in connection with s. 95. No proof is necessary of direct meeting or combination, nor need the persons be brought into each other's presence; but the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. Nor is it necessary that all the accused should have joined in the scheme from its inception. Eliciting answers from witnesses while under examination-in-chief or re-examination, by leading questions, deprecated. *Per CARNDUFF J.* Regard being had to the definition of "proved" in s. 3 of the Evidence Act, "moral conviction," provided it is based exclusively on evidence that is admissible, is not distinguishable from "legal proof." Save when an accused person is being examined under s. 342 of the Criminal Procedure Code, there is nothing to prevent a Magistrate from eliciting information from him by independent enquiry so long as the information is voluntarily given. A statement by an accused to the police, which tells against him but does not amount to an admission of guilt, is admissible in evidence. Each case must be decided as it arises with reference to the question whether the particular statement is or is not a confession. *Queen v. Macdonald*, 10 B. L. R. App. 2, *Empress v. Dabee Pershad*, 1 L. R. 6 Calc. 530, *Queen v. Amir Khan*, 9 B. L. R. 36, 72, and *Emperor v. Mahomed Ebrahim*, 5 Bom. L. R. 312, referred to. *Queen v. Hurrihols Chunder Ghose*, 1 L. R. 1 Calc. 207, *Queen-Empress v. Mathews*, 1 L. R. 10 Calc. 1022, *Queen-Empress v. Meher Ali Mullick*, 1 L. R. 15 Calc. 589, *Imperatrix v. Pandharinath*, 1 L. R. 6 Bom. 34, and

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<i>Queen-Empress v. Javecharam</i> , I. L. R. 19 Bom. 362, discussed and distinguished. Handwriting may, in addition to the usual methods, be proved by circumstantial evidence under s. 67 of the Evidence Act which prescribes no particular kind of proof. <i>Neel Kanto Pandit v. Juggobundhoo Ghose</i> , 12 B. L. R. App. 18, <i>Abdool Ali v. Abdoor Rahman</i> , 21 W. R. 429, and <i>Abdulla Para v. Gannibai</i> , I. L. R. 11 Bom. 690, referred to. <i>BARINDRA KUMAR GHOSE v. EMPEROR</i> (1909) I. L. R. 37 Calc.	467	Building and Residential Lease—Heritability—Transferability—Transfer of Property Act (IV of 1882) s. 108 (j) Where there is a lease for building and residential purposes, in the absence of any intention to the contrary, indicated either in the terms of the grant or in the nature of the tenancy, the leasehold interest is heritable, and the tenancy does not determine by the death of the lessee, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit. Such a tenancy, in the absence of any custom or contract to the contrary, is governed by the provisions of the Transfer of Property Act, and is consequently <i>prima facie</i> transferable under s. 108 (j) of that Act. <i>KISHORILAL ROY CHOWDHRY v. KRISHNA KANTINI CHOWDHRI</i> (1910) I. L. R. 37 Calc.	377
Kabuliyat, construction of—Rent, partly in money and partly in kind—Fixed rent—Evidentiary value of later documents between different parties in construing an earlier one. Where the terms of a document clearly point to the fact that the rent is to be partly in money and partly in kind, the rent cannot be regarded fixed in amount, even though the <i>kabuliyat</i> is a <i>mokarrari</i> one, and in the original deed the two items of rent in kind and rent in cash were lumped up and expressed as a consolidated money-rent. An earlier document cannot be construed by reference to a later document which is not between the same parties. <i>BANESWAR MUKHERJI v. UMESH CHANDRA CHAKRABARTI</i> (1910) I. L. R. 37 Calc.	626	Decree against recorded tenants, effect of—Representation, principle of. When the recorded tenant represents a holding on behalf of all his co-sharers, such holding passes by a sale in execution of a decree for arrears of rent obtained by the landlord against such tenant. <i>Ashok Bhuiyan v. Karim Bepari</i> , 9 C. W. N. 843, discussed. <i>JAGATTARA DASSI v. DAULATI BEWA</i> (1909) I. L. R. 37 Calc.	75
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claimed: *Held*, that, inasmuch as the tenants voluntarily agreed to an enhancement of rent, they deliberately waived the benefit of the said covenant, and they could not impeach the validity of their own agreement on this particular ground. *Zamir Mandal v. Gopi Sundari Dasi*, I L R. 32 Calc. 463 (note), referred to. Under s. 180 of the Bengal Tenancy Act, a raiyat holding a *chur* land, but who has not acquired a right of occupancy, is liable to pay such rent for his holding as may be agreed on between him and his landlord, irrespective of the provisions of s. 43 of the Act. *JAHANDAR BAKSH MALLIK v. RAM LAL HAZRAH* (1910) I L R. 37 Calc.

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— *Enhancement of rent by addition of a rent-in-kind*—Bengal Tenancy Act (VIII of 1885) s. 29. Section 29 of the Bengal Tenancy Act applies even where a money-rent is enhanced by the addition of a rent-in-kind. *KISHORI MOHUN BOSE v. SHEIKH UJIR* (1910) I L R. 37 Calc. ...

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— *Kaimi lease*—Lease created before the Transfer of Property Act (IV of 1882)—Trees planted after lease—Right of removal of trees by tenant—Fixtures, doctrine of—Bengal Tenancy Act (VIII of 1885) s. 23—Transfer of Property Act (IV of 1882) ss. 2, 103 (h). In the absence of any special provision in a lease granted before the Transfer of Property Act (IV of 1882) came into force, the property in the trees planted by the lessee after a *kaimi* lease had been granted does not vest in the landlord. The rule laid down in s. 103, cl. (h) of the Transfer of Property Act (IV of 1882), has no application to such a case. The lease in the present case not being for agricultural or horticultural purpose, s. 23 of the Bengal Tenancy Act has no application. The doctrine of the English Law of Fixtures cannot be appropriately extended to this country on equitable grounds. *Bain v. Brand* (1876) 1 A. C. 762, *Mears v. Callender*, [1901] 2 Ch.

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388, *Elwes v. Maw*, 2 Smith's Leading Cases 189; 3 East 38, *Ness v. Pacard*, 2 Peters 137, referred to. The Law of Fixtures is not recognised under the Hindu or Mahomedan laws. *Thakoor Chunder Peramanick v. Ramdhone Bhattacharjee*, 6 W. R. 229; B. L. R. F. B. 595, *Secretary of State v. Charlesworth Pilling & Co.*, I L R. 26 Bom. 1, *Khodeeram Serma v. Trilochun*, 1 Mac. Sel. Rep. 35, *Jankee Singh v. Bukhooree Singh*, (1856) Beng. S. D. A. 761, *Pogose v. Nyamutoollah*, (1858) Beng. S. D. A. 1517, *Brij Bhookun v. Dabee Dyal*, (1863) 2 Agra S. D. A. 490, *Kalee Pershad Dutt v. Gourree Pershad Dutt*, 5 W. R. 108, relied upon. Before the passing of the Transfer of Property Act, the doctrine of the English Law of Fixtures did not prevail in this country, and the provisions of that Act substantially reproduced the law on this subject as recognised by Hindu and Mahomedan jurisprudence. *Ismail Kani Rowthan v. Nazarali Sahib*, I L R. 27 Mad. 211, referred to. *MOFIZ SHEIKH v. RASIK LAL GHOSE* (1910) I L R. 37 Calc. ...

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— *Occupancy raiyats*—Enhancement of rent—Proof of rise in price of staple food-crops, how ascertained and Court's duty in the matter—Prevailing rate for similar land in same or neighbouring villages with same advantages—Bengal Tenancy Act (VIII of 1885) ss. 29, 30, 32, 39. In a suit for enhancement of rent under s. 30 of the Bengal Tenancy Act, it is the duty of the Court to refer to the price-lists prepared under s. 39, whether the parties to the suit produce those or not. It is right and proper that the Civil Court, in directing a local investigation under s. 31 (b), should indicate to the officer holding the investigation what it is that the Court precisely requires. Where the Court is satisfied that all the rent in the village should be excluded from consideration in finding out the prevailing rate in the village, because it is fixed in

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a mode which contravenes the provisions of s. 29 of the Bengal Tenancy Act, then an enquiry should be directed which will bring to light the prevailing rate of rent paid by occupancy <i>raiyyats</i> for lands of a similar description and with similar advantages in the neighbouring villages. NABIN CHANDRA SHAHA <i>v.</i> KULA CHANDRA DHAR (1910) I. L. R. 37 Calc. ...	742	zemindari of the appellant, the Rajah of Pachete, had under their lease, which had been granted by a predecessor in title of the appellant about 60 years ago, acquired any rights to the minerals beneath the surface of the village which they could have transmitted to the respondents who claimed to hold under them. There was no document or evidence defining the terms of the lease to the Goswamis. Two decrees in favour of the Rajah for the payment of an annual rent of Rs. 22-15-6 by the Goswamis were put in, in one of which they were described as "cultivators," and in the other as "britti-holders." There was no evidence whatever that the Rajah had ever granted mineral rights in the village to the Goswamis or to any other person. Both the Courts in India found that the village was a <i>mal</i> (rent-paying) village of the zemindari of the Rajah, and that no prescriptive right had been proved by the respondents to any underground rights in the village. The High Court held that the zemindar had created a permanent tenure of an agricultural character, and that the tenure-holder would possess all underground rights in the absence of express reservation by the zemindar. <i>Held</i> , by the Judicial Committee (reversing that decision), that the title of the zemindar Rajah to the village being established, he must be presumed to be the owner of the underground rights appertaining thereto in the absence of evidence that he had parted with them, and no such evidence had been produced. Field's Bengal Regulations, Introduction, page 36, referred to. In the case of leases under the existing law of 1882 (the Transfer of Property Act, IV of 1882, s. 108), no right arises for a lessee to work mines not open when the lease was granted. HARI NARAYAN SINGH DEO <i>v.</i> SRIRAM CHAKRAVARTI (1910) I. L. R. 37 Calc. ...	723
<i>Occupancy right, extinguishment of—New occupancy right in the same holding—Acquisition of adverse rights in two capacities. Non-occupancy raiyat, if he can sub-let and create incumbrance—Bengal Tenancy Act (VIII of 1885) ss. 22 cl. (2), 157, 160 cl. (g). When an occupancy right is extinguished by the operation of s. 22, cl. (2) of the Bengal Tenancy Act, a new occupancy right cannot be acquired in the same tenancy by the co-sharer proprietor by whose action the occupancy right has ceased to exist. The owner of a holding cannot acquire a right adversely to himself in his other character as co-proprietor. A non-occupancy raiyat is a raiyat, and the land held by him is a 'holding'; s. 159 of the Bengal Tenancy Act applies to non-occupancy holdings also. A non-occupancy raiyat is not prohibited from sub-letting and may have an under-raiyat under him, and may create a protected interest under s. 160, cl. (g), if his landlord allows him so to do. An incumbrance may be created by a non-occupancy raiyat on his holding, in limitation of his own interest, however limited, by way of sub-lease. RAM LAL SUKUL <i>v.</i> BHELA GAZI (1910) I. L. R. 37 Calc. ...</i>	709	<i>Record-of-Rights—Presumption of permanency</i>	
<i>Permanent tenure of an agricultural character—Under-ground rights not mentioned in lease—Minerals under surface of land—Rights of Zemindar—Onus of proof—Transfer of Property Act (IV of 1882) ss. 108, 117. The question for decision in this case was, whether certain Goswamis, the sebais of an Idol and lessees of a village in the</i>			

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Landlord and Tenant—<i>concl'd.</i>		Lease—<i>concl'd.</i>	
of rent— <i>Bengal Tenancy Act (VIII of 1885), as amended by Bengal Acts III of 1898 and I of 1903, ss. 50, 105, 115.</i> When an application is made under s. 105 of the Bengal Tenancy Act, as amended by Bengal Acts III of 1898 and I of 1903, for settlement of rent, after the final publication of the record-of-rights, the tenant is entitled, in view of the provisions of s. 115 of the Bengal Tenancy Act, to the benefit of the presumption under s. 50 of the same Act. <i>Radha Kishore Manikya v. Umed Ali</i> , 12 C. W. N. 904, approved. <i>Secretary of State for India v. Kajimuddi</i> , I. L. R. 26 Calc. 617, distinguished. <i>PIRTHICHAND IAL CHOWDHRY v. BASARAT ALI</i> (1909) I. L. R. 37 Calc. ...	30	rental, recited the area of the land demised under the lease, the nature of the interest granted by the lease, and the instalments in which rents were payable: <i>Held</i> , that the letter being a non-testamentary instruments which purported to limit in future a vested interest of the value of Rupees one hundred and upwards in immoveable property, was not admissible in evidence without being registered. <i>Biraj Mohinee Dasee v. Kedar Nath Karmakar</i> , I. L. R. 35 Calc. 1910, referred to. <i>Held</i> , also, that the mere fact that rent for some years had been received at the reduced rate did not bind the lessor to accept rent at that rate in future, inasmuch as, even if the letter had been treated as an agreement for reduction of rent, it was not enforceable in law, having been made without consideration. Where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter. <i>Newsom v. Pryor's Lessee</i> , 7 Wheaton U. S. 7, referred to. But where these two elements—the boundaries and the quantity—are equally certain and exactly defined, or the boundaries are as precise and definite as the quantity is specific and exact, and there is gross divergency between the quantity specified and the quantity found to be included within the defined boundaries, preference should be given to that element of the description of the subject-matter which is more consistent with the intention of the parties to be collected from the other parts of the deed, illuminated, if necessary, by the surrounding circumstances and the subsequent conduct of the parties. <i>Lord v. The Commissioners for the City of Sydney</i> , 12 Moo. P. C. 473, 14 Eng. R. 991; <i>White v. Luning</i> , 93 U. S. 514; <i>Crogham v. Nelson</i> , 3 How. U. S. 187; and <i>Holmes</i>	
portion of a non-transferable jote— <i>Joint possession—Transfer, validity of.</i> The purchaser of a portion of a <i>raiya</i> jote which is not transferable without the landlord's consent, and where there is no finding of such consent, is not entitled to have joint possession of the jote. It is open to tenants in occupation of a portion of the jote to question the validity of the transfer. <i>AGARJAN RIBI v. PANATULLA</i> (1910) I. L. R. 37 Calc. ...	687		
Landlord and Tenant Procedure Act (Beng. VIII of 1865): See UNDER—			
TENURE, SALE OF ...	823		
Leading Questions: See JURY, RIGHT OF TRIAL BY ...	467		
Lease: See STAMP-DUTY ...	629		
— <i>Evidence—Letter containing all the elements of a lease, whether admissible in evidence without registration—Payment of rent at a reduced rate on the basis of that letter, effect of—Conflicting descriptions of the subject-matter of a grant—Lessee not put in possession of specific area mentioned in the lease, effect of—Mistake of fact—Abatement of rent.</i> In a suit for rent at a certain rate, the lessee pleaded that by virtue of a letter addressed to him by the lessor, the latter was entitled to get rent only at a reduced rate. The letter contained a definition of the reduced			

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Lease—conold.		Letters of Administration : See HINDU	
<i>v. Trout</i> , 7 Pet. U. S. 171, referred to. Where a lease is taken of a specific quantity of land within definite boundaries, both the lessor and the lessee being under a common mistake that such quantity exists within the boundaries, while in fact it is much less, there is no valid contract, and the parties are entitled to rescission thereof : but the defendant has the option to affirm the contract, and hold the lease for the lesser quantity with proportionate abatement of rent. <i>Page v. Marshall</i> , 2 Ch. D. 255 ; <i>Harris v. Pepperell</i> , 5 Eq. 1 ; and <i>Garrard v. Frankel</i> , 30 Beav. 145, referred to. DURGA PRASAD SINGH v. RAJENDRA NARAIN BAGCHI (1909) I. L. R. 37 Calc....	293	LAW—SUCCESSION ...	214
— <i>Unregistered Solehnama, admissibility in evidence of—Registration Act (III of 1877) s. 17 cls. (d) and (8). A solehnama, by which no immediate interest in immoveable property is created, and whereby there has been no demise, does not amount to a 'lease' within the meaning of clause (d) of s. 17 of the Registration Act, and is merely an agreement to create a lease on a future day. Such a document falls within clause (h) of s. 17 of the Indian Registration Act and is admissible in evidence without registration. PANCHANAN BOSE v. CHANDI CHARAN MISRA</i> (1910) I. L. R. 37 Calc. ...	808	— — : See PRO	
Legal Practitioner's Act (XVIII of 1879) ss. 13, 14 : See PRACTICE	173	BATE ...	224
Lessee, liability of, to pay rent after transfer : See LESSOR AND LESSEE	683	Libel—Words defamatory per se—Imputation of criminal offence—Fair comment—Privileged occasion—Hansard's Parliamentary Reports, admissibility of—Statement of Newspaper Correspondent—Evidence of bad character—Proceedings in Parliament—Evidence Act (I of 1872) ss. 55, 57, 78 (2)—Malice—Plaintiff's political character—Deportation—Regulation III of 1818—Judicial notice—Issues—Reputation—Damages, assessment of. The expression "that the plaintiff has been guilty of tampering with the loyalty of the Punjab Sepoys" amounts to an imputation that he has been guilty of an offence under ss. 124A and 131 of the Indian Penal Code, and is punishable with transportation for life. A fair comment on matter of public interest is not libel. <i>Merivale v. Carson</i>, 20 Q. B. D. 275, referred to. <i>Per HARRINGTON J.</i> Imputing a criminal offence to a person is not fair comment, and that the fact that another person on a privileged occasion made a similar statement is no protection to the defendants. Publication of a fair and an accurate report of proceedings in Parliament is privileged even though the words are defamatory. <i>Wason v. Walter</i>, L. R. 4 Q. B. 73, referred to. A libel, which is privileged when it appears as the report of a speech in Parliament, is not privileged when it appears as the statement of a newspaper correspondent. The proceedings of Parliament may be proved, under s. 78 (2) of the Evidence Act, by the Journals of the House of Commons or by copies purporting to be printed by order of the Government. Where the gist of the action was damage to the plaintiff's character, the defendants were entitled to show that the plaintiff was a person whose reputation would not be damaged by a particular libel in question.	
Lessor and Lessee—Transfer by lessee—Liability of lessee to pay rent after transfer—Privy of estate—Transfer of Property Act (IV of 1882) s. 108. The duration of liability of a lessee to pay rent to the lessor lasts as long as his estate remains in his possession and no longer : and after an assignment of the lease, the privy of estate between him and the lessor ceases, and the assignee becomes liable for the rent. MEHTA v. GADADHAR RAI (1910) I. L. R. 37 Calc. ...	683		

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The fact that the plaintiff was a man of considerable influence in the Punjab, and took part in a meeting calculated to influence the minds of the people against the Government, and that he was deported seven weeks after the meeting under a Regulation empowering the Government to take that step for the purpose of preserving a portion of His Majesty's dominions from internal commotion, should be taken into consideration in assessing the damages. In mitigation of damages, the defendants can give evidence of the plaintiff's bad character, but not evidence of rumours and suspicions of bad character. *Scott v. Sampson*, 8, Q. B. D. 491, referred to. *Per* WOODROFFE J. Subject to certain well-known limitations, that which has probative force is evidence. The deportation of the plaintiff was evidence as throwing light on the character of his agitation previous thereto and as thus affecting damages. The presumption of regularity required that it should be assumed that the deportation appeared to Government to be necessary. When the presumption had operated to this extent, the fact presumed might itself form the basis of a further inference that what had appeared to be necessary had so appeared, because there was an actual cause in fact for such appearance. The subject of 'judicial notice' discussed; and the meaning of s. 57 of the Evidence Act explained. Hansard is an appropriate book of reference in case of Parliamentary debates. Fair comment is not a branch of the law of privileged occasion. The law as to fair comment stated. The Code requires that issues should be settled on the Original Side of the High Court. Reputation includes both character and disposition, and disposition is not the less proven because it appears on the face of the facts deposed to by the plaintiff himself, or is a proper inference from

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those facts. Assessment of general damages discussed. The English cases which deal with the question of the revision of damages by the Court of Appeal have no application in this country, where the Jury system, with respect to which the English decisions have been given, does not prevail. "THE ENGLISHMAN" LTD. *v.* LAJPAT RAY (1910) 1 L. R. 37 Calc. ...

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Lieutenant-Governor : *See* BAIL ... 412

Limitation : *See* MAINTENANCE GRANT 674

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-----Adverse possession—Dispute between senior and junior chelas as to succession to Hindu maths—Ekrarnama allotting one math to senior chela in perpetuity and the other to junior chela as *adhikari*—Suit instituted within twelve years from senior chela's death, but 27 years from date of ekrarnama—Hindu Law—Endowment. The Mohant of the temple of a Hindu idol who was in possession of two maths, one at Bhadrak and the other at Bibisarai, died leaving two chelas, or disciples, between whom a controversy arose as to the right of succession to the maths and the property annexed to them. The dispute was settled by an arrangement embodied in an ekrarnama, dated 3rd of November 1874, executed by the senior chela in favour of the junior chela, by which the math at Bhadrak was allotted in perpetuity to the senior chela and his successors, while the math at Bibisarai and the properties annexed to it were allotted to the junior chela (described therein as an *adhikari*) and his successors for the purposes connected with his math, subject to an annual payment of Rs. 15 towards the expenses of the Bhadrak math. Less than twelve years after the death of the senior chela, but considerably more than that period after the date of the ekrarnama, the appellant, the successor of the senior chela, brought a suit against the junior

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chela to recover possession of the properties annexed to the Bibisara *math*, on the allegation that they were *debutter* property dedicated to the worship and service of the plaintiff's idol, and held by the respondent (representing the junior *chela*) as an *adhikari* in charge of the Bibisara *math* and asserting it to be a *math* subordinate to the Bhadrak *math* :—*Held* (affirming the decision of the High Court), that the property dealt with by the *ekranama* was, prior to its date, to be regarded as vested not in the Mohant but in the idol, Mohant being only its representative and manager, and consequently that from the date of the *ekranama* the possession of the junior *chela*, by virtue of its terms, was adverse to the right of the idol, and of the senior *chela* as representing that idol, and that the suit was barred by limitation. **DAMODAR DAS v. LAKHAN DAS** (1910) I. L. R. 37 Calc. ...

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Limitation Act (XV of 1877) s. 20—
Payment of interest on behalf of minor by manager of a joint Hindu family, effect of—“Duly authorised Agent.” A payment of interest by the manager of a joint Hindu family consisting of himself and his minor brothers, is a payment by the “duly authorised agent” of the minors within the meaning of s. 20 of the Limitation Act, 1877. **SARADA CHARAN CHAKRAVARTI v. DURGARAM DE SINHA** (1910) I. L. R. 37 Calc. ...

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s. 22 :

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Art. 95 : *See* PRINCIPAL AND AGENT ... 81

Art. 120 : *See* MAHOMEDAN LAW —ENDOWMENT ... 263

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Local Government, order of, authorising complaint: See JURY, RIGHT OF TRIAL BY ... 467

Local Government, powers of: See JURY, RIGHT OF TRIAL BY ... 467

Local Inspection—*Power of Magistrate to make such inspection during a trial to understand the evidence and to determine the credibility of witnesses—Importing into judgment facts observed on such inspection—Disqualification of Magistrate—Illegality of conviction—Criminal Procedure Code (Act V of 1898) ss. 148, 202, 293, 294, 556, Explanation.* A Magistrate may inspect the place of the occurrence of an offence in cases where he cannot follow or understand the evidence without seeing the features of the land, and he does not, merely by doing so, disqualify himself from trying the case. But every possible precaution should be taken that the inspection is only a view of the local features, and an immediate report of what he has seen should be placed on the record and laid open to the scrutiny of the parties. The Magistrate can use the testimony of his own senses to test the veracity of the witnesses before him as regards the features of the locality, but he cannot import into the case other matters or facts which he has himself observed. Where the Magistrate did not merely view the place of occurrence for the purpose of following or understanding the evidence and testing it in respect of the features of the locality, but imported into his judgment matters of opinion and inference based on circumstances not on the record, and did not place thereon the results of his local inspection :—*Held*, that he had committed an error of jurisdiction which may have materially prejudiced the accused, and that the conviction was, therefore, bad in law. The Explanation to s. 556 of the Criminal Procedure Code does not directly authorize a Magistrate to make a local inspection, but saves his jurisdiction to try a case, notwithstanding his having made such inspection or investigation, and does not do away with the restrictions under which they should be made. *Girish Chunder Ghose v. Queen-Empress*, I. L. R. 20 Calc. 857; *Hari Kishore Mitra v. Abdul Baki Miah*,

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Local Inspection—concl'd.		Magistrate, transfer of—concl'd.	
I. L. R. 21 Calc. 920; <i>Queen-Empress v. Manilam</i> , I. L. R. 19 Mad. 263; <i>In re Lalji</i> , I. L. R. 19 All. 302; <i>Satri Dulahi v. Empress</i> , 3 C. W. N. 607; <i>Nidani Mondal v. Alabaxa Sirkar</i> , 9 C. W. N. cccxii, and <i>Lal Behari Saha v. Bejoy Sankar Sikdar</i> , 10 C. W. N. 181, referred to. <i>BAB-SON SHEIKH v. EMPEROR</i> (1910) I. L. R. 37 Calc. ...	340	commenced such an inquiry, is transferred, and the District Magistrate has made over the case to another Magistrate, the latter has power, under s. 350 of the Code, to proceed with it without examining the witnesses <i>de novo</i> . <i>ANU SHEIKH v. EMPEROR</i> (1910) I. L. R. 37 Calc. ...	812
Locus delicti : See EMIGRATION ...	27	Mahomedan Law—Endowment—Wakf	
Locus standi to maintain suit : See UNDER TENURE, SALE OF ...	823	— <i>Direction of Founder, Court's power to disregard—Mutwalli, suit for the office of—Surrender of the office of Mutwalli and appointment of a successor by a person who is not a general trustee, effect of—Limitation Act (XV of 1877) Sch. II, Art. 120.</i> In appointing a <i>Mutwalli</i> a Court will not disregard the directions of the founder except for the manifest benefit of the endowment. <i>In re Tempest</i> , L. R. Ch., 1 App. 485; 14 L. T. 685, referred to. A created a <i>wakf</i> on the 22nd April 1864; by the <i>wakfnamah</i> he appointed himself the first <i>mutwalli</i> , and also gave directions as to the appointment of his successors. The deed further provided that after the death of the founder his widow would remain in possession of the endowed properties, and the <i>mutwalli</i> would act under her orders. During the lifetime of the founder, the person who was nominated as the successor in the office of <i>mutwalli</i> died; subsequently, on the founder's death in 1868, his widow obtained certificate and undertook the performance of the duties of <i>mutwalli</i> , and continued to do so till the 29th of January 1877, when she executed a <i>towliatnamah</i> , by virtue of which she surrendered the office of <i>mutwalli</i> , and appointed a third party as her successor in that office, who accordingly took possession of the endowed properties. Upon a suit by the plaintiff as one of the representatives of the founder for declaration of his right as <i>mutwalli</i> and for recovery of possession of the endowed properties: <i>Held</i> , that inasmuch as the widow of the founder was in no sense a general trustee, and that she	
Magistrate acting in two capacities : See JURISDICTION OF MAGISTRATE ...	221		
Magistrate, powers of—District Magistrate, power of, to cancel bond for keeping the peace or for good behaviour—Order directing prosecution for using forged rent-receipts in a proceeding before a subordinate Magistrate, for keeping the peace, and for abetment thereof—"Judicial proceeding"—Criminal Procedure Code (Act V of 1898) ss. 4 (m), 125, 476. Section 125 of the Criminal Procedure Code gives the District Magistrate the power to cancel a bond for keeping the peace for reasons which appear to him sufficient, but not the right to hear an appeal from an order in a proceeding under s. 107 passed by a subordinate Magistrate. A District Magistrate has no jurisdiction under s. 476 of the Code to direct a prosecution for dishonestly using a forged document and for abetment in respect of rent-receipts filed before a subordinate Magistrate in a case under s. 107 of the Code, which has been disposed of by him under s. 125, the proceeding under which is not a "judicial proceeding." <i>DAYANATH THAKUR v. EMPEROR</i> (1909) I. L. R. 37 Calc. ...	72		
Magistrate, transfer of—Inquiry—Continuance of inquiry by another Magistrate without the examination of the witnesses de novo—Criminal Procedure Code (Act V of 1898) ss. 145, 350. Section 350 of the Criminal Procedure Code applies to an inquiry under s. 145. Where a Magistrate, who has			

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had no authority, express or implied, to modify in any way the terms of the trust-deed, nor she had the authority to renounce the office and appoint a successor, her acts were illegal under the Mahomedan Law, and that Article 120 of Sch. II of the Limitation Act applied to the case, and the plaintiff's suit was barred by limitation. **KHAJEH SALIMULLAH v. ABUL KHAIR M. MUSTAFA** (1909) I. L. R. 37 Calc.

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Endowment—

Wakf—Mortgage of wakf property by Mutwalli for necessity of urgent character, whether valid—Effect of obtaining permission of Cadi after the Mortgage—Loan by a trustee at a high rate of interest. Under the Mahomedan Law, mortgage of wakf property by the mutwalli in case where necessity is established is valid, even if the permission of the Cadi is obtained subsequent to the mortgage. Where, therefore, a Court found that a mortgage by a mutwalli of wakf properties was for urgent necessity and that the mortgage was proper, the mortgage is valid in law, inasmuch as it might be taken to have been retrospectively approved by the Court. A loan by a trustee of endowed property at the rate of interest at 12 per cent. per annum with quarterly rests, could not be considered beneficial to the endowment, although the principal sum itself might have been urgently raised for the protection of the endowment; and in such a case the Court is justified in allowing interest at a reduced rate. **NIMAI CHAND ADDYA v. GOLAM HOSSEIN** (1909) I. L. R. 37 Calc. ...

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Probate—Will, admissibility of, in evidence. without probate—Probate and Administration Act (V of 1881) s. 4—Succession Act (X of 1865) s. 187, Hindu Wills Act (XXI of 1870) s. 2. There is no provision of law rendering it obligatory, in the case of a Mahomedan will, to take probate. After due proof, a Mahomedan will is admissible in evidence, notwithstanding that

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grant of probate has not been obtained. **Fatma v. Shaik Essa**, I. L. R. 7 Bom. 266, not followed. **Shaik Moosa v. Shaik Essa**, I. L. R. 8 Bom. 241, followed. **Kherodemoney Dossee v. Durgamoney Dossee**, I. L. R. 4 Calc. 455, **Administrator-General of Bengal v. Premial Mullick**, I. L. R. 22 Calc. 788. **Sarat Chandra Banerjee v. Bhupendra Nath Basu**, I. L. R. 25 Calc. 103. **Bhagvansang Bharaji v. Becharadas Harjivandas**, I. L. R. 6 Bom. 73, and **Surbomungola Dabee v. Mohendronath Nath**, I. L. R. 4 Calc. 508, referred to. **SAKINA BIBEE v. MAHOMED ISHAK**, (1910) I. L. R. 37 Calc. ...

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Wakf property, sanction to sell—Jurisdiction—Practice—Trustees Act (XXVII of 1866) s. 3—Trustees' and Mortgagees' Powers Act (XXVIII of 1866) s. 45—"Cases to which English law is applicable." On an application made by the mutwalli to a wakf, for sanction to sell wakf property:—**Held**, that there being no statute authorising such an application, such sanction could only be obtained by means of a suit. *In the Matter of Wooratunnessa Bibee*, I. L. R. 36 Calc. 21, not followed. Although a Judge of the High Court exercises the functions of a kazi when administering Mahomedan law, the procedure to be adopted is to be regulated by the Code of Civil Procedure, and the Rules and Orders of the High Court. **Shama Churn Roy v. Abdul Kabeer**, 3 C. W. N. 158, and **Nemai Chand Addya v. Golam Hossein**, I. L. R. 37 Calc. 179, referred to. Such an application does not come within the purview of Acts XXVII and XXVIII of 1866: these Acts govern only such trusts as are in the form of an English trust and are constituted by persons of purely English domicile, or persons governed by the Indian Succession Act. *In re Kahandas Narrandas*, I. L. R. 5 Bom. 154, and *In re Nilmoney Dey Sarkar*, I. L. R. 32 Calc. 143, not followed. *In re HALIMA KHATUN* (1910) I. L. R. 37 Calc. ...

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Maintenance Grant : <i>See</i> GRANT ...	674
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Malicious Prosecution. — <i>Cause of Action</i> — <i>Complaint laid, but no Process issued.</i> Where in a suit for malicious prosecution, it was averred that a complaint had been laid by the defendant before a Magistrate who thereupon sent the case to the police for enquiry and report, but there was no averment that the Magistrate had ever issued process :— <i>Held</i> , that the plaintiff disclosed no cause of action. <i>Yates v. The Queen</i> , L. R. 14 Q. B. D. 648, followed ; <i>Clarke v. Postan</i> , 6 C. & P. 423, and <i>Ahmedbhai v. Framji Edulji</i> , L. L. R. 28 Bom. 226, not followed ; <i>Thorpe v. Priestmalt</i> , [1897] 1 Q. B. 159, referred to. <i>DEROZARIO v. GULAB CHAND ANUNDJEE</i> (1910) L. L. R. 37 Calc. ...	358
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dian-ad-litem, right of—*Benefit to Minors*—*Minors if entitled to impugn sale afterwards for want of fresh proclamation*—*Transfer of Property Act (IV of 1882) s. 89*—*Civil Procedure Code (Act XIV of 1882) s. 291*. The Court has jurisdiction to order stay of a sale in execution of a mortgage-decree under s. 291 of the Civil Procedure Code, 1882. *Shyamkishan v. Sundar Koer*, L. L. R. 31 Calc. 373, explained. *Bibijan Bibi v. Sachi Bewah*, L. L. R. 31 Calc. 863, referred to. There is no conflict between s. 89 of the Transfer of Property Act and s. 291 of the Code of Civil Procedure, 1882. The former section is concerned with the Court's order-absolute for sale, the latter with the adjournment of the sale. The two sections relate to different matters. Even if an order of the Court is erroneous, it is *ordinarily* not open to a party, who has obtained and enjoyed the benefit of an erroneous order, to turn round afterwards and ask that the order should be treated as a nullity and disregarded. The guardian *ad litem* appointed by the Court and acting in good faith is entitled to make applications on behalf of the minors and has the power to waive the right of the minors to a fresh sale-proclamation after postponement of the sale, if the postponement enured to the benefit of the minors. The minors are not entitled in such a case to impugn the sale on the ground that a fresh sale-proclamation was not made. *BIPIN BEHARI MITRA v. JATINDRA NATH GHOSE* (1910) L. L. R. 37 Calc. ...

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— *Order absolute, application for*—*Foreclosure*—*Limitation*—*Execution of decree, application for*—*Revival of pending execution*—*Limitation Act (IX of 1908) Sch. II, Art. 181*. Previous to the passing of the Limitation Act (IX of 1908) and the Civil Procedure Code (V of 1908) there was no rule of limitation applicable to an application for order absolute of a decree *nisi* made under s. 86 of the Transfer

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Mortgage—*contd.*

of Property Act (IV of 1882). *Tiluck Singh v. Parsotein Prosad*, I. L. R. 22 Calc. 924, *Rahmat Karim v. Abdul Karim*, I. L. R. 34 Calc. 672, referred to. An application for execution of a decree may be treated as one in continuation or revival of a previous application. similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless, or has been suspended by reason of an injunction or like obstruction. *Qamaruddin Ahmad v. Jawahir Lal*, I. L. R. 27 All. 334; I. R. 32 I. A. 102, *Rudra Narain Guria v. Pachu Maity*, I. L. R. 23 Calc. 437, *Narayan Govind Manik v. Sono Sadashiv*, I. L. R. 24 Bom. 345, *Rahim Ali Khan v. Phul Chand*, I. L. R. 18 All. 482, *Mir Aymuddin v. Mathura Das*, 11 Bom. H. C. 206, *Suppa Reddiar v. Avudai Ammal*, I. L. R. 28 Mad. 50, *Paras Ram v. Gardner*, I. L. R. 1 All. 355, referred to. The Limitation Act (IX of 1908) does not profess to provide for all kinds of applications whatsoever. *Govind Chunder Goswami v. Rungunmoney*, I. L. R. 6 Calc. 60, *Sital Prosad v. Abdul Rashid*, 11 Oudh Cases 208, referred to. Nor does it apply to an application to a Court to do what the Court has no discretion to refuse. *Kylasa Goundan v. Ramasami Ayyan*, I. L. R. 4 Mad. 172, *Balaji v. Kushaba*, I. L. R. 30 Bom. 415, referred to. Nor is it applicable to an application to the Court to terminate a pending proceeding. the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court. *Puran Chand v. Roy Radha Kishen*, I. L. R. 19 Calc. 132, referred to. Article 181, Sch. II of the Limitation Act (IX of 1908), does not govern an application for order absolute under order 34, rule 3 of the Civil Procedure Code (V of 1908). *MADHABMANI DASI v. LAMBERT* (1910) I. L. R. 37 Calc. ...

Practice—First mortgagee's suit for sale—Surplus of sale

Mortgage—*contd.*

proceeds—Second mortgagee's claim for sale in first mortgagee's suit of other property on which he has a mortgage—Civil Procedure Code (Act V of 1908) order XXXIV—Costs. B mortgaged property in Calcutta to A and afterwards mortgaged the same property and a further property in the mofussil to C. A brought an ordinary mortgage suit against B for sale, making C a party-defendant. A obtained a decree; C thereupon claimed to be entitled to a decree for sale of the property mortgaged to A including the mofussil property not included in A's mortgage:—*Held*, that in A's suit C could only obtain the surplus of the sale-proceeds of the property in that suit and could not get any relief against the other property in the mofussil. *Kissory Mohun Roy v. Kally Churn Ghose*, I. L. R. 22 Calc. 100, *Kissory Mohun Roy v. Kali Churn Ghose*, I. L. R. 24 Calc. 190, *In re Kissory Mohun Roy v. Kali Charan Ghose*, 1 C. W. N. 106, and *Platt v. Mendel*, 27 Ch. D. 246, distinguished. *Mackintosh v. Watkins*, 1 C. L. J. 31, followed. The effect of the incorporation of the sections in the Transfer of Property Act into order XXXIV of the new Code of Civil Procedure is to put an end to any independent practice on the Original Side of the High Court based on the old procedure, and the Original Side should now follow the provisions of order XXXIV of the Code. Costs will be on Scale No. 2, not Scale No. 1, against the mortgagor who does not appear. *SARAT CHANDRA ROY CHOWDHRY v. NAHAPIET* (1910) I. L. R. 37 Calc. ...

Registration—Registration Act (III of 1877) s. 17, cl. (n)—Endorsement on a mortgage-bond of payment made in satisfaction of a previous mortgage-debt—Civil Procedure Code (Act XIV of 1882) s. 43—Payment by a subsequent mortgagee under s. 74 of the Transfer of Property Act (IV of 1882), effect of. The endorsements on a mortgage-bond of payments

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made in satisfaction of a mortgage, which payments did not purport to extinguish the mortgage, are covered by cl. (n) of s. 17 of the Registration Act, and as such do not require registration. *Jivan Ali Beg v. Basa Mal*, I. L. R. 9 All. 108, and *Uppalakandi Kunhi Kutti Ali Haji v. Kunnam Mithal Kottapath Abdul Rahiman*, I. L. R. 19 Mad. 288, followed. A subsequent mortgagee who makes a payment of a prior mortgage-debt under the provisions of s. 74 of the Transfer of Property Act, in a suit to enforce his original mortgage against the security which, by his payment of the former mortgage, he has protected and made more valuable for the realisation of his debt, is bound, under s. 43 of the Code of Civil Procedure, to join in that suit any further claim which he has against that property by reason of such payment made by him. *Sunder Singh v. Bhotu*, I. L. R. 20 All. 322, distinguished. *HARI NARAIN BANERJEE v. KUSUM KUMARI DAS* (1910) I. L. R. 37 Cal. ...

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—*Sale of mortgaged property*
—*Prior mortgagee, right of, to deposit in Court decretal amount in payment of puisne mortgage-debt.* A second mortgagee brought a suit on his mortgage making the transferees of the prior mortgage parties to the suit, and obtained a decree; and in execution thereof the transferees applied to be allowed to deposit in Court the full amount of the second mortgage-debt in order to save the property from sale. The Court of first instance allowed the application; but, on appeal, the District Judge set aside the order of the first Court:—*Held*, that the transferees of the prior mortgagee were entitled to pay off the mortgage debt due on the subsequent mortgage to save the mortgaged property from sale. *BRAJAHARI MAITI v. GAJENDRA NARAIN MAITI*, (1909) I. L. R. 37 Cal. ...

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Mortgagor and Mortgagee: See **TITLE** 239

Multifarious Document: See **STAMP-DUTY** ... 62.

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Munsif, jurisdiction of: See **ADOPTION** 860

Murder—Violent and determined attack by a number of persons, regardless of the consequences, on another, causing other injuries and severe ruptures of a healthy spleen—Intent to cause death or such bodily injury as the offender knows to be likely to cause death—Penal Code (Act XLV of 1860) ss. 300 (1), (2) and 302. A body of six persons attacked another with cattle goads in a violent and determined manner, inflicting sixteen wounds on his body and causing several and severe ruptures of his spleen, and so caused his death. The person attacked was a strongly built man of 35 years of age, and his spleen was in a healthy state:—*Held*, that such acts, committed by several persons on one, in such a manner, apparently regardless of the consequences, and with such results, warranted the inference that the acts were done by those persons with the intention either of causing the death of the person attacked or such injuries as the offenders knew to be likely to cause his death: and that the offence amounted to murder. *ELEM MOLLA v. EMPEROR* (1907) I. L. R. 37 Cal. ...

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Mutwalli, mortgage by: See **MAHOMEDAN LAW—ENDOWMENT** ... 179

Mutwalli, suit for the office of: See **MAHOMEDAN LAW—ENDOWMENT** 263

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Occupancy Right, extinguishment of: See **LANDLORD AND TENANT** ... 709

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Offence brought to the notice of Court in the course of judicial proceeding: See **“COURT,” MEANING OF** 642

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**Opium—Illicit sale—Proof of the fac-
tum of the sale—Presumption
from inability to account satis-
factorily for opium in absence of
evidence of any sale—Opium Act
(I of 1878) ss. 9, 10.** The effect
of ss. 9 and 10 of the Opium Act,
1878, is that, when once it is
proved that the accused has
dealt with opium in one of the
ways described in s. 9 the *onus*
of showing that he had a right
so to deal with it is placed on
him by s. 10. But the com-
mission of the act, which is the
foundation of the particular
offence charged under s. 9, must
be proved before the presumption
raised by s. 10 comes into
operation at all, and the pre-
sumption cannot be used to es-
tablish such act. Where, there-
fore, there is no evidence to
prove the fact of any sale of
opium by a person accused of
illicit sale, the deficiency is not
supplied by the statutory pre-
sumption, and a conviction of
illicit sale is bad. *ISHWAR
CHANDRA SINGH v. EMPEROR*,
(1910) I. L. R. 37 Cal. ...

Opium Act (I of 1878) ss. 9, 10 :
See OPIUM ...

----- ss. 9 (c), 10 :
See OPIUM, ILLEGAL POSSESSION
OF ...

**Opium, illegal possession of—Opium
Act (I of 1878) ss. 9 (c), 10—Mere
possession contrary to the Act
without guilty frame of mind—
Respective liabilities of owner of
boat and crew—Presumption of
commission of offence under the
Act—"Conveyance"—Boat. Under
ss. 9 (c) and 10 of the Opium
Act (I of 1878), mere possession
of opium without being able to
account for it satisfactorily, apart
from any frame of mind, is an
offence. The owner of a boat
in which opium is found is in**

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possession of it, but not the crew
when they are neither owners
nor jointly interested with him
in any venture as an incident of
which possession might be attri-
buted to them. Where the
owner of a boat alleged that
opium was carried on board by
a passenger without his know-
ledge, but there were circum-
stances disproving his story :—
Held, that as he had not satis-
factorily accounted for its pos-
session, it must be presumed,
under s. 10, that it was opium
in respect of which he had com-
mitted an offence under the Act.
Quære : whether a boat in which
opium is carried is a "convey-
ance" used in carrying it so as
to be liable to confiscation on
conviction of the owner under
the Act. *EMPEROR v. HAMID ALI*,
(1909) I. L. R. 37 Cal. ...

Order Absolute, application for : *See*
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**Pardon—Forfeiture of pardon—Pro-
per Court to determine the question
of forfeiture—Withdrawal of par-
don by the Court granting it—
Power of the Special Bench to re-
open the question on a plea of par-
don taken at the trial for the origi-
nal offence in respect of which
it was granted—Criminal Proce-
dure Code (Act V of 1898) ss. 337,
339.** Where an approver, to
whom a pardon was granted
under s. 337 of the Criminal Pro-
cedure Code by the committing
Magistrate, resiles, at the hear-
ing of the case before the Special
Bench, from his deposition given
before such Magistrate, the Spe-
cial Bench can only discharge
him, but cannot take any action
against him for the offence in
respect of which he was accorded
the pardon. If he is proceeded
against for the original offence,
the committing Magistrate who
granted the pardon must deter-
mine whether he has complied
with its terms or not, and there-
by forfeited the same ; and the
question cannot be reopened at
his trial before the Special Bench
for such offence. *Queen-Empress
v. Manick Chandra Surkar*, I. L.
R. 24 Cal. 492, approved of.

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Emperor v. Kothia, I. L. R. 30 Bom. 611, and *Kullan v. Emperor*, I. L. R. 32 Mad. 173, referred to. *King-Emperor v. Bala*, I. L. R. 25 Bom. 675, distinguished. *EMPEROR v. ABANI BHUSHAN CHUCKERBUTTY* (1910) I. L. R. 37 Cal. ... 845

Parliament, proceedings in: See LIBEL 760

Parties—Addition of parties—Limitation Act (XV of 1877) s. 22—

Changing character of defendant after period of limitation for suit has expired—Amendment of Plaintiff—Civil Procedure Code (Act XIV of 1882) ss. 32, 53, 532—Suit against Debttar estate—Expenses necessary for Debttar estate—Indemnity to estate of former sebaity by successor—Liability of Debttar estate. The parties to this litigation were the descendants of a testator, who by his will dedicated immoveable property to the performance of the worship of certain idols and other pious acts, and provided for the order of succession to the office of sebaity among his descendants. The suit was instituted on 25th January 1897 by the respondents as executors of a deceased sebaity against the appellant, who had been appointed receiver of the debttar estate, for money which, owing to interference and obstruction by the appellant in the collection of the rents, had not been received by the deceased sebaity during his sebaityship, and for expenses he had consequently been obliged to pay out of his private funds to protect the estate, and enable him to perform his obligations as sebaity. All the other surviving descendants of the testator were made parties, and the appellant was sued both in his capacity as receiver and in his personal capacity. After the expiration of the period of limitation prescribed for the suit, an amendment of the plaint was made by the Court adding to it a prayer that it might be determined who was the sebaity, and that the debttar estate should be represented by the person declared to be entitled to the

Parties—concl'd.

sebaityship. The appellant was found to be so entitled and was impleaded as sebaity:—*Held*, affirming the decision of the High Court, that the object of the amendment was merely to determine judicially which of the living descendants of the original testator, all of whom were already parties to the suit, was to be considered sebaity. It did not alter the character of the suit, nor amount to the addition of a new defendant within the meaning of s. 22 of the Limitation Act (XV of 1877), and the suit was therefore not barred. *Held*, also, that the estate of the deceased sebaity was entitled to be reimbursed all sums properly expended by him in the preservation of the debttar estate (as payment of Government revenue and the like), and in defending his position as sebaity which was challenged unsuccessfully by the appellant. *Walters v. Woodbridge*, L. R. 7 Ch. D. 504, followed. The respondents were also entitled to recover all moneys properly expended by the deceased sebaity in performing the obligations imposed upon him by the original testator's will. The right of indemnity was incident to the position of a trustee, and the liability in respect of that indemnity was the first charge on the trust estate. *PEARY MOHUN MUKERJEE v. NARENDRA NATH MUKERJEE* (1909) I. L. R. 37 Cal. ... 229

Parties, addition of: See REMAND 171

Partition: See HINDU LAW ... 703

———: See TITLE, SUIT FOR ... 662

———: See VENDOR AND PURCHASER ... 362

———: *Right to partition—Partition between owner of fractional share in zemindari interest, and mokararidars in joint possession—Interest not less permanent because the mokarari lease was liable, in certain events, to forfeiture.* The right of partition exists when two parties are in joint possession of land under permanent titles, although their titles may not be identical.

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Partition—concl'd.		Penal Code (Act XLV of 1860)—	
<i>Remadri Nath Khan v. Ramani Kanta Roy</i> , I. L. R. 24 Calc. 575, cited with approval. The appellants, plaintiffs in a suit for partition, were proprietors of a <i>mokarari</i> interest in the property partition of which was sought, and the respondents, defendants in the suit, were owners of a fractional share in the zemindari interest in the same property. The <i>mokarari</i> lease was, in certain contingencies, liable to forfeiture, and the High Court held that the appellants' tenure was on that account not sufficiently permanent to support their claim to partition, to which they would otherwise have been entitled:— <i>Held</i> , by the Judicial Committee (reversing that decision), that the distinction drawn by the High Court could not be supported. The appellants' title was a permanent one, though liable to forfeiture in events which had not occurred, and the rights incidental to that title must be those that attached to it as it existed, without reference to what might be lost in the future under changed circumstances. BHAGWAT SAHAI v. BIPIN BEHARI MITTER (1910) I. L. R. 37 Calc. ...	918	<i>concl'd.</i>	
Passing-off Action: See TRADE-MARK	204	<i>Nazir</i> . A distress warrant issued under the Public Demands Recovery Act which has been extended beyond the original date of return, but does not bear on the face of it the altered date, is not a legal warrant under order XXI, rule 24 (2) of the Civil Procedure Code. A warrant under s. 45 of the Village Chaukidari Act must contain the name of the person charged with the execution thereof and cannot be legally executed by any other person delegated by the former for that purpose. Where the accused released certain buffaloes attached by the Civil Court peons, on the 2nd August, under two warrants addressed to the nazir, but endorsed by him to them, the one issued under the Public Demands Recovery Act, which was originally returnable by the 26th July but had been extended to the 8th August, without the alteration of the date appearing thereon, and the other under s. 45 of the Village Chaukidari Act directed to the nazir but without naming any person therein as charged with the execution of it:— <i>Held</i> , that they were not guilty of an offence under s. 186 of the Penal Code, as the peons were not lawfully executing the warrants. SREIK NASUR v. EMPEROR (1909) I. L. R. 37 Calc. ...	122
Patnidars and Dar-patnidars, rights of: See CHOWKIDARI CHAKRAN LANDS ...	57	s. 193,	
Penal Code (Act XLV of 1860) ss. 121, 121A: See JURY, RIGHT OF TRIAL BY ...	467	Expl. (2): See JUDICIAL PROCEEDING... ...	52
See ACQUITTAL ...	604	ss. 300	
s. 182:		(1), 302: See MURDER ...	315
s. 186.		Permanent Agricultural Tenure: See LANDLORD AND TENANT ...	723
—Voluntarily obstructing Public Servants in the discharge of their public functions—Releasing property attached by Civil Court peons under distress warrants issued under the Public Demands Recovery Act (Beng. I of 1895) and the Village Chaukidari Act (Beng. VI of 1870) s. 45—Legality of warrant—Omission to specify date of extension on the face of it—Civil Procedure Code (Act V of 1908) order XXI, rule 24 (2)—Execution by person not named in the warrant—Delegation of powers by		Permanent Improvements: See VENDOR AND PURCHASER ...	362
		Permanent Tenure: See TITLE, SUIT FOR ...	662
		Perpetual Injunction: See INJUNCTION	731
		Personal Debt: See PUTNI TENURE	747
		Plaint: See PLEADINGS ...	856
		Plaint, amendment of: See PARTIES	229
		Plaintiff, non-appearance of: See APPEAL ...	426

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Pleadings—Fraud, sole ground of relief—Alteration of ground of relief by picking out facts from allegations in the plaint—Defendant's duty in cases based on fraud. Where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations in the plaint facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. <i>Hickson v. Lombard</i> , L. R. 1 H. L. 324, and <i>Guthrie v. Aboul Mozuffer Nooroodin Ahmed</i> , 15 W. R. P. C. 50, referred to. RAJENDRA KUMAR BOSE v. GAN-GARAM KOYAL (1910) I. L. R. 37 Calc. ...	856	Power of Attorney—concl'd. allowed, it takes effect from the date when the power-of-attorney was originally filed. CHHAYE-MANNESSA BIBI v. BASIRAB RAH-MAN (1910) I. L. R. 37 Calc. ...	399
Police Report: See CRIMINAL PROCEEDINGS, INSTITUTION OF ...	49	Practice: See ADOPTION ...	860
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Poundage, Sheriff's right to: See PRACTICE ...	649	————: See MORTGAGE ...	900
Power of Attorney—Omission of name of Mukhtiar in the power by mistake—Amendment of mistake by Court by allowing fresh power to be filed—Inherent jurisdiction of Court to allow amendment of mistake—Effect of amendment as to limitation—Civil Procedure Code (Act V. of 1908) ss. 36, 37—Rules and Circular Orders, Ch. XI, Art. 34. Where there is no doubt as to the fact that the mukhtiar who filed an application for execution had in fact authority from the decree-holder to do so, and that his name was omitted by mistake from the power-of-attorney, the Court may, in its discretion, allow the power to be amended, upon proper application by the decree-holder for the insertion of the name of the attorney. If such amendment is		————: See PROBATE ...	224
		———— Decree, amendment of—Decree not conformable to what the Court intended—Inherent power of Courts in India—Attachment, setting aside of—Sheriff's right to Poundage—Civil Procedure Code (Act V. of 1908) s. 152. The Courts in India have an inherent power to amend or vary decrees so as to bring them into accordance with the judgments, after they are signed by the Judges, even if they do not fall within s. 152 of the Civil Procedure Code (Act V of 1908). <i>In re Swire</i> , 30 Ch. D. 239, referred to. <i>Ainsworth v. Wilding</i> , [1896] 1 Ch. 673, distinguished. The Sheriff is only entitled to poundage on sums levied: so where a seizure is wrongful and is withdrawn by direction of law, the Sheriff receives no poundage. <i>Mortimore v. Cragg</i> , 3 C. P. D. 216, <i>In re Ludmore</i> , 13 Q. B. D. 415, and <i>In re Thomas</i> , [1899] 1 Q. B. 460, followed. BRIJ RATAN v. JAY-NARAIN , (1910) I. L. R. 37 Calc. ...	649
		———— Decree, modification of the terms of, after appeal—Jurisdiction—Appellate Court, powers of—Civil Procedure Code (Act V. of 1908) s. 148. Section 148 of the Civil Procedure Code, 1908, cannot be taken to give any Court power to interfere with or modify its decree after there has been an appeal filed against the decree. The only Court that could, after an appeal had been preferred, modify the terms of the decrees, or extend the time fixed in the decree for its execution, or suspend the order made in the decree, would be the	

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Appellate Court. <i>PARMANAND DAS v. KRIPASINDHU ROY</i> , (1909) I. L. R. 37 Calc. ...	548
— Jurisdiction—Legal Practitioners' Act (XVIII of 1879) ss. 13, 14—Division Bench, jurisdiction of, to hear reference under the Act from subordinate Courts. According to a long and undeviating course of practice, which may be regarded as the law of the Court, a Division Bench appointed to dispose of the civil business arising out of a particular Group, has power to hear and dispose of a reference, under s. 14 of the Legal Practitioners' Act, by the Presiding Officer of a Court within that Group. <i>ABINASH CHANDRA MOITRA, In re</i> (1909) I. L. R. 37 Calc. ...	173
— Vakils' right to appear before a Judge sitting on the Original Side of the High Court—Application to file warrant of attorney—Extraordinary Civil Jurisdiction—Civil Procedure Code (Act XIV of 1882) s. 635—Civil Procedure Code (Act V of 1908) ss. 119, 129. A vakil of the High Court applied before a Judge sitting on the Original Side of the Court, claiming a right to file a warrant of attorney in respect of a suit pending before the Midnapore District Court, in which a rule had been issued calling upon the plaintiffs to show cause why the suit should not be transferred to the High Court in its Extraordinary Original Civil Jurisdiction: <i>Held</i> , that, having regard to the long-continued course of practice during which vakils never appeared on the hearing of such applications, the present application should be refused. <i>Held</i> , further, that the Civil Procedure Code of 1908 has nothing to do with a matter governed by old rules in force before 1909. <i>In re A VAKIL'S APPLICATION</i> , (1910) I. L. R. 37 Calc. ...	853
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Principal and Agent—Bribe or secret commission accepted by Agent after transaction completed—Contracts obtained by fraud voidable but not void—Limitation Act (XV of 1877) Sch. II, Art. 95. The plaintiff instituted a suit against the defendants within three years from the date when the fraud as alleged in the suit became first known to him, though he had suspicions of the fraud prior to the three years. The suit was for setting aside a lease which the plaintiff alleged he had been induced to grant to the defendant No. 1 under fraudulent representations made to the plaintiff by the defendant No. 2, who, whilst purporting to act as the plaintiff's servant or agent, received, after the lease had been duly drawn up, executed and registered, the sum of Rs. 500 from the defendant No. 1 as a bribe or secret commission by way of payment for the services rendered to the latter in connection with the making of the arrangements for the execution of the lease:— <i>Held</i> , that mere suspicion is not knowledge, and the suit was not barred by limitation. <i>Held</i> , further, that a bribe is nevertheless a bribe because its payment is postponed. When a bribe has been given, it is immaterial to inquire what, if any, effect the bribe had on the mind of the receiver and whether he was influenced thereby to recommend to the plaintiff an arrangement with the appellant which he would not otherwise have recommended. <i>Harrington v. Victoria Graving Dock Company</i> , L. R. 3 Q. B. D. 549, and <i>Shipway v. Broadwood</i> , [1899] 1 Q. B. 369, referred to. <i>Held</i> , further, that a contract induced	

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by fraud is only voidable, and the remedy by rescission is open only so long as the parties can be restored to the relative position which they originally occupied. *Urquhart v. Macpherson*, L. R. 3 App. Cas. 831, followed. *Clough v. London and North-Western Railway Company*, L. R. 7 Ex. 26, referred to. *INDRA NATH BANERJEE v. ROOKE*, (1909) L. L. R. 37 Cal. ...

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Privy Council, practice of—Dismissal of appeal with costs—Alteration of decree appealed from in respondents' favour without cross-appeal by them. In a suit on a promissory note for Rs. 16,042 principal, and interest at 1½ per cent. per mensem, and also for interest "on the decree from the date of the institution of the suit until realisation," the first Court passed a decree for only Rs. 500 "with interest as prayed." The Chief Court of Lower Burma ordered that "the decree of the Original Court be altered to a decree for the full amount claimed," and said nothing about interest. The plaintiffs (respondents) applied by petition to the Chief Court to amend its decree by adding a specific statement that "interest as prayed for in the plaint" was payable on the decretal amount, but the application was dismissed. The defendant appealed to the Privy Council, and shortly before the case came on for hearing, the respondents petitioned for special leave to enter a cross-appeal so far as the decree of the Chief Court had failed to include interest after the institution of the suit. A consent order in Council was made on 5th March 1910 that the respondents should

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have leave on the hearing to appeal on the question raised in their petition, and their Lordships, while dismissing the appeal, altered the decree of the Chief Court as prayed in the petition, without a cross-appeal being entered. *CASSIM AHMED JEWI v. NARAINAN CHETTY*, (1910) L. L. R. 37 Cal. ...

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—*Testamentary and Intestate Jurisdiction—Revocation—Probate and Administration Act (V of 1881) s. 50—Official Trustee of Bengal—Official Trustee's Act (XVII of 1864).* Where a Judge exercising the original testamentary and intestate jurisdiction of the High Court granted probate to the Official Trustee of Bengal, the probate being expressed to be granted to the Official Trustee of

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Bengal for the time being, assuming the order to have been erroneous, it cannot be said that the Judge acted without jurisdiction so as to bring the matter within the scope of s. 50 of the Probate and Administration Act. OFFICIAL TRUSTEE OF BENGAL v. KUMUDINI DAS, (1910) I. L. R. 37 Calc. ...	387	See FERRY ...	543
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	<i>tanto</i> . Where the plaintiffs released some of the wrong-doers from liability, the claim against the others have been split up by their own conduct, and a joint decree ought not to be passed against all the defendants. <i>Bissonauth Tewarry v. Koylashbany Narain Singh</i> , 2 Hay 297, followed. <i>RAMRATAN KAPALI v. ASWINI KUMAR DUTT</i> , (1910) I. L. R. 37 Calc. ... 559	
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	<i>ss. 8, 11—Beng. Act XI of 1859, s. 33.</i> An incorrect entry in a sale notification, resulting in misleading intending bidders, is an irregularity such as is contemplated by s. 33 of Bengal Act XI of 1859. <i>Deonandan Singh v. Manbodh Singh</i> , I. L. R. 32 Calc. 111, discussed. Though s. 8 of Bengal Act VII of 1868 prevents a plaintiff from proving any irregularity in the service of notice required by s. 11, yet it would not prevent him from proving that a notice in contravention of the provisions of that Act was served in a wrong mehal which in itself and by its service supported the conclusion that the mis-statement in the sale notification constituted a serious irregularity. <i>RAJBANT DAS v. GANESHPRASAD SRICHANDAN MAHAPATRA</i> , (1910) I. L. R. 37 Calc. ... 407	
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<p>false statements, but gave true evidence at the trial, sanction should not be granted. <i>EMPEROR v. TRIPURA SHANKAR SARKAR</i>, (1910) I. L. R. 37 Calc. ...</p> <p>—<i>Jurisdiction</i></p> <p>—<i>High Court, jurisdiction of—District Judge—Criminal Procedure Code (Act V of 1898) ss. 195 (1) cl. (b) and 476—Revision—Civil Procedure Code (Act V of 1908) s. 115.</i> Neither the High Court nor the District Judge has power, under s. 476 of the Criminal Procedure Code, to direct a prosecution for an offence committed before a Provincial Small Cause Court. <i>Begu Singh v. Emperor</i>, I. L. R. 34 Calc. 551, referred to. The High Court itself is precluded from granting sanction in such a case under s. 195, sub-s. (1), cl. (b) of the Criminal Procedure Code, as a Provincial Small Cause Court is not subordinate to it within sub-s. (7), cl. (c), nor can it interfere under sub-s. (6) with an order of a District Judge revoking a sanction granted by such Small Cause Court. <i>Hamijuddi Mondol v. Damodar Ghose</i>, 10 C. W. N. 1026, <i>Girija Sankar Roy v. Binode Sheikh</i>, 5 C. L. J. 222, and <i>Muthuswami Mudali v. Vesni Chetti</i>, I. L. R. 30 Mad. 382, referred to. Where the District Judge revoked a sanction granted by a Subordinate Court to a District Magistrate on the ground that 'a sanction could not be granted to a third party,' and initiated proceedings under s. 476 of the Criminal Procedure Code:—<i>Held</i>, that he acted illegally in the exercise of his jurisdiction, and that the High Court had power to set aside his order under s. 115 of the Code of Civil Procedure (Act V of 1908). <i>Hamijuddi Mondol v. Damodar Ghose</i>, 10 C. W. N. 1026, distinguished. <i>In re RAM PRASAD MALLA</i>, (1909) I. L. R. 37 Calc. ...</p>	618
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subordinate Magistrate or of a police officer, which is not legal evidence. <i>Queen-Empress v. Prithi Pal Singh</i> (1898) ALL W. N. 154. <i>Emperor v. Tota</i> , I. L. R. 25 All. 272, <i>Emperor v. Balwant</i> , I. L. R. 27 All. 293, <i>Re Abdul Khan</i> , 10 C. W. N. 1027, and <i>Suresh Chandra Basu v. Emperor</i> , 3 C. L. J. 575, followed. <i>KALU MIRZA v. EMPEROR</i> , (1909) I. L. R. 37 Calc. ...	91	<i>Money received by servant of a firm and handed over to fellow-servant—Consideration—Acknowledgment of receipt by fellow-servant of a sum larger than Rs. 20, if liable to stamp-duty—Stamp Act (II of 1899), s. 2 (23), Sch. I, Art. 53.</i> Where a sum exceeding Rs. 20 was received by an assistant in a mercantile firm from the cashier of the firm as advance made on the firm's behalf, and to be expended on the firm's behalf, and previous to disbursement of the sum in question a pay-order was made out by the Accounts Department of the firm and was sent to the cashier who had paid the sum to the assistant, and the assistant at the same time acknowledged receipt by signing his name or initials on the pay-order: <i>Held</i> , that the acknowledgment did not require a receipt-stamp by reason of the assistant's signature on the pay-order. <i>Attorney General v. Carlton Bank</i> , [1899] 2 Q. B. 153, distinguished. <i>In re BURN, & Co.</i> , (1910) I. L. R. 37 Calc. ...	634
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Title—Priority of Title—Mortgagor and Mortgagee—Deposit of Title Deeds—Right to decree for Foreclosure—Equity of Redemption—Sale of right, title, and interest of Mortgagor at Court sale in execution of decree. This was a case of contested title to two plots of	

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land near Moulmein. The title of the plaintiff (appellant) was that by deed of 26th July 1890 (Ex. B) the property was mortgaged to a firm who by deed of transferred dated 8th November 1904 (Ex. A.), assigned the mortgage debt and transferred the security for it to one A. R. and he, in October 1895, deposited the title deeds with the plaintiff by way of equitable mortgage. In 1901 the plaintiff enforced the mortgage by suit against A. R. and on 31st December of that year obtained a decree for sale in default of payment, in pursuance of which the right, title and interest of A. R. in the property comprised in the above title deeds were sold by auction, and the plaintiff, who bid by leave of the Court, became the purchaser, a certificate to that effect under the hand and seal of the Court being endorsed on Ex. A. The other title was set up by a person who was not one of the original defendants (the mortgagors of 1890), but a person added as a party defendant by consent subsequently to the filing of the suit. He stated that, after the assignment to A. R. of the mortgage-debt, the original mortgage was satisfied by the mortgagors making over the mortgaged property to A. R., who by deed dated 14th March 1895, mortgaged it to the defendant, and he brought a suit on the mortgage, and on 21st July 1902 obtained a decree for payment in six months or foreclosure, and, on default being made, became absolute owner of the property. The District Judge found (issue 2) that the mortgaged property was not made over to A. R. in satisfaction of the mortgage-debt, and so holding, thought it unnecessary to decide issue 3, "Did A. R. mortgage the property to the defendant?" and issue 4, "Did the property, by virtue of the decree of 21st July 1902, become the absolute property of the defendant?" He held that the plaintiff had acquired the rights of the original mortgagee in the property under Ex. B, and gave him a mortgage decree with interest. On appeal,

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the Chief Court reversed that decision, substantially on the ground that A. R. had no interest in the property at the date of the sale to the plaintiff. It was pointed out (*inter alia*) on appeal to the Judicial Committee that the mortgage of 14th March 1895 was a usufructuary mortgage on which the defendant had no legal right to a decree for foreclosure, that that mortgage, by reason of the defendant being himself only a mortgagee, the equity of redemption being outstanding in the original mortgagors, was beyond the power of the defendant to grant and was therefore void; that the plaintiff was not a party to the decree of 21st July 1902, and therefore could not be affected by it; and that, notwithstanding the alleged mortgage of 1895, the title deeds remained in the possession of A. R. Their Lordships were of opinion that the decision of the Chief Court was untenable, and finding that it was impossible to pronounce a final judgment without serious risk of doing injustice to one or other of the two parties principally concerned, allowed the appeal, set aside the decrees of the lower Courts, and remanded the suit to the District Judge for findings on issues 3 and 4 with an inquiry as to the priority between the plaintiff and the defendant, and for retrial. *MOUNG THA HNYIN v. MAUNG MYA SU* (1909) I. L. R. 37 Calc. ...

Title, suit for—Partition—Jurisdiction of Civil Court—Permanent tenure—Estates Partition Act (Beng. VIII of 1876) ss. 7, 111, 149. The plaintiffs and the defendants were co-owners of a certain *taluk*. In the course of proceedings under the Estates Partition Act (Beng. VIII of 1876), the plaintiff raised a claim to a *miras*, or permanent tenure, in respect of certain lands comprised in the said *taluk*. The Revenue Officer held in favour of the defendants that the plaintiff's title to the *miras* was not established. Thereupon, the plaintiff sought relief in the Civil Court, asking

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that his title to the *miras* be declared. The contention raised on behalf of the defendants appellants was that the order of the Revenue Officer was made under s. 111 of the said Act, and that the suit was not maintainable by reason of s. 149 of the same Act: *Held*, that s. 111 of the Act provided for cases of permanent intermediate tenures, and prescribed the mode in which partition was to take place when the fact of such permanent tenure was established, and had no application to the present case; and that a suit for declaration of title to the permanent tenure was maintainable, the object of s. 149 being not to exclude the jurisdiction of the Civil Court in matters which involved a question of title. *Ananda Kishore Chowdhry v. Daiji Thakurain*, I. L. R. 36 Calc. 726, referred to: *Held*, further, that if in the course of a partition proceeding under Bengal Act VIII of 1876, any question arose as to the extent or otherwise of the tenure, the tenure-holder not being a party to the proceedings, he was not affected in any manner by the decision which might be arrived at by the revenue authorities for the purpose of partition between the proprietors. It would be unreasonable to hold that a party who appeared before the revenue authorities in his character as a proprietor should be finally concluded by a decision upon a question of title, which would not have been binding upon him, if he had been a stranger to the proceedings. Where the tenant based his title to the permanent tenure on the existence of the tenure for 75 years and more, prior to the institution of his suit for declaration of his title, and on his purchase and possession from the date of his purchase up to the date of the partition proceedings under the Estates Partition Act: *Held*, that under the circumstances the tenancy was a permanent one. *Niratan Mandal v. Ismail Khan*, I. L. R. 32 Calc. 51, *Naba Kumari Debi v. Behari Lal Sen*, I. L. R. 34 Calc. 902, referred to. *Abdul Wahed Khan v.*

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<i>Shaluka Bibi</i> , I. L. R. 21 Calc. 496, distinguished. The only effect of such a decree is to decide that the tenure is permanent, and the question as to whether the rent is or is not fixed in perpetuity is left open for decision in a suit properly framed for the purpose. <i>JANAKI NATH CHOWDHRY v. KALI NARAIN ROY CHOWDHRY</i> , (1910) I. L. R. 37 Calc. ...	662	
Trade-mark. —Registration, effect of— <i>Vendors' mark—Infringement of trade-mark—Passing-off Action—Injunction, variation of.</i> An action for the infringement of a trade-mark is maintainable, even though the plaintiff be not the manufacturer or selector of the goods, but merely a vendor of them. There is no system of registration of trade-marks in India which gives a statutory title. In a suit for the infringement of a trade-mark, the plaintiff claimed the right to the exclusive user of a flower of a particular design, but his evidence was directed to establish that his goods were recognised by the general design of a flower (<i>phul-marka</i>):— <i>Held</i> , that in the circumstances of the case, an association had been established between the plaintiff's particular design and the goods sold thereunder, and inasmuch as the defendants had adopted the plaintiff's trade-mark for his own purposes, the plaintiff was entitled to an injunction. Although no specific objection was taken on appeal to the form of the injunction ordered in the Court of first instance, which proceeded on the erroneous assumption that the goods sold by the plaintiff were prepared by him, a variation should be introduced into the terms of the injunction, so as to fit it with the facts as actually established. <i>JAWALA PRASAD v. MUNNA LAL SEROWJEE</i> , (1909) I. L. R. 37 Calc. ...	204	
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Under-tenure, sale of—Execution sale—Effect of sale of under-tenure by co-sharer landlord for arrears of rent—Non-registration of purchase in execution sale by the whole body of landlords—Locus standi to maintain a suit—Rent Recovery Act (X of 1859) ss. 27, 105, 106, 108, 109 and 110—Civil Procedure Code (VIII of 1859) s. 259—Landlord and Tenant Procedure Act (Beng. VIII of 1865). While under s. 105 of Act X of 1859, which contemplates a decree by the landlord, or the whole body of landlords, for an arrear of the entire rents due in respect of an under-tenure, it is the tenure that is sold, under s. 108, which does not contemplate a decree for an arrear of rent, but a decree for money due on account of a share of rent and a suit for it by only a sharer in a		

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joint undivided estate, it is only the right, title and interest of the judgment-debtor in the under-tenure that passes. *Doolar Chand Sahoo v. Lalla Chabeel Chand*, L. R. 6 I. A. 47; 3 C. L. R. 561, and *Shamchand Kundu v. Brojonath Pal Chowdhry*, 12 B. L. R. 484; 21 W. R. 94, followed in principle. The purchaser of an under-tenure under s. 105 of Act X of 1859 is entitled to maintain a suit for possession against a subsequent purchaser under s. 103, though he has not got his name registered in the landlord's sherista. *Kristo Chunder Ghose v. Raj Kristo Bandyopadhyaya*, I. L. R. 12 Calc. 24, followed. *Luckhinaraiah Mitter v. Khettropal Singh Roy*, 13 B. L. R. 146; 20 W. R. 380, referred to. *Patit Shahu v. Hari Mahanti*, I. L. R. 27 Calc. 789, distinguished. *Bichitra-nanda Roy v. Behari Lal Pandit*, 5 C. L. J. 89, questioned. The mere fact that a person cannot succeed in a suit does not mean that he has no *locus standi* to maintain the suit. It is only where the Legislature distinctly or in effect provides that certain conditions must be fulfilled to entitle a person to maintain a suit, and those conditions precedent are not fulfilled, that the person has no *locus standi* to sue. *NILADRI MAHANTI v. BICHITRANAND ROY*, (1910) I. L. R. 37 Calc. ... 823

Unlawful Assembly and Theft: See JUDGMENT OF APPELLATE COURT, CONTENTS OF ... 194

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Vendor and Purchaser—*Executor, conveyance by, as beneficial owner—Construction—Inconsistency between recitals and operative part—All-estate clause, effect of—Partition—Permanent improvements—Enquiry.* A Hindu, governed by the Bengal school of Hindu Law, died in 1886 leaving a will,

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whereby he devised certain immoveable property to his daughter A, subject to certain charges by way of maintenance. Probate was granted to the executors B and others in 1887. A died in 1891 intestate, leaving her surviving five sons, B and four others, a married daughter, and two unmarried daughters, the plaintiff and another. In 1900 a conveyance of the property was executed by B and his surviving brothers in favour of the defendants. This deed proceeded on the assumption that B and his brothers were absolutely and beneficially entitled to the property; they, however, purported to convey "all he estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon the said property." On a suit instituted by the plaintiff for the declaration of her title to a moiety in the property and for partition:—*Held*, that, inasmuch as on A's death the property devolved as her *stridhan* property on her unmarried daughters, and as B did not purport to sell and convey as executor, the plaintiff was entitled to a moiety in the property as against the defendants, and that a decree for partition should be passed. Inasmuch as by a decree, dated the 10th December 1903, the defendants became absolutely entitled to the moiety which had devolved on plaintiff's unmarried sister, and as the defendants had expended moneys in improving the property—*Held*, that there must be an account of the money expended by the defendants in permanent improvements since the 10th December 1903, and an enquiry as to the extent to which the present value of the property had been increased by the expenditure. *PURA SUNDARI DAS v. BIJRAJ NOPANI*, (1910) I. L. R. 37 Calc. 362

Vendor's Mark: See TRADE-MARK ... 204

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